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# Supreme Court of the United States

OCTOBER TERM, 1911.

MARCELINO TORRES ZAYAS,
*Appellant,*
*vs.*
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPO, and ALICE LOTHROP,
*Appellees.*

No. 1063.

## On Appeal from the Supreme Court of Porto Rico

# APPELLANT'S BRIEF

C. M. BOERMAN,
*Counsel for Appellant.*

HERBERT CLARKE, PRINTER
PARIS
1912

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MARCELINO TORRES ZAYAS,
APPELLANT.
vs.
LOTHROP, LUCE & Co.,
PEDRO JUAN ROSALY and
ALICE LOTHROP,
APPELLEES.
No. 435.

*On Appeal from the Supreme Court of Porto Rico.*

I

***APPELANT'S BRIEF.***

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## ERRATA

On page 6 line 14 add as follows: Rosaly, defendant, was given by defendant's counsel the following question about a supposed modification of clause of the mortgage deed:—Q" "State the stipulation submitted to you by Mr. Torres".—The plaintiff objecting and then excepting.—Ans: According to the stipulation containing in the deed Mr. Torres Zayas had no right to have funds advanced to him for the expenses of the crop; about the middle of the year 1902 he told us that he had the property mortgaged; it was impossible to raise money to advance to him to cover said expenses, and it was stipulated that money could be obtained having notes signed by him, said money to be applied by him to the payment of said expenses, and the money so advanced should be paid out of the funds with preference to anything else".

On page 6 line 26 add as follows: Alejandro Alvarado was given by plaintiffs counsel the following question: "Was the sale made by Mr. Torres an actual sale?" "Which question was not permitted by the Court, the plaintiff excepting.

On page 6 line 29 add as follows: José Soto, attorney for the defendants and a former Judge of the Ponce District Court, was examined by himself, as to a sup-

posed order made by him while Judge, which order does not exist on record, neither in the minutes of the Court, nor in the judgment book thereof. Q. "What was the order?" Objection of plaintiff and exception. Ans. "Directing a writ of execution to be issued to the Marshall to sell the properties at public auction."

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No. 435.

**On Appeal from the Supreme Court of Porto Rico.**

I.

## APPELANT'S BRIEF.

The appeal comes up to this Court from a judgment entered by the Supreme Court of Porto Rico confirming a judgment of the District Court of Ponce in the Island of Porto Rico.

The appellant here has brought proceedings in the said District Court of Ponce, in which he alleged that he was the owner of a certain coffee plantation, named "Semil," situated in the said District. That he has borrowed a certain sum of money from William S. H. Lothrop and that as security for the payment of said sum he instituted a hipothek or mortgage on the said estate, giving a number of mortgage notes to the order of said mortgagee That the interests on said mortgage were payable yearly in the following way, stipulated in the said mortgage contract, to wit: that the mortgagor should

deliver yearly the coffee crop to the commercial firm of De Ford & Co., which firm was made Trustee of the mortgagee for that purpose, and that from the price money realized on the sale of the coffee so delivered there should be paid the yearly interest due on the said mortgage first of all, and that then from any sum remaining there may be paid other debts or liabilities of the mortgagor to the mortgagee. That the said firm of De Ford and Company, Trustees of the mortgagee, did so appropriate for several years the money realized from the sales of the coffee delivered to them by the mortgagor, in paying first yearly the interest due on the said mortgage and from any sum remaining after such payment, the other debts or liabilities of the mortgagor to the mortgagee, and that they did so up to the year 1904, in which year they contrary to the stipulation of the mortgage contract appropriated all the money realized in that year from the sale of the coffee crop, which sum realized exceeded the interests due that year, for the payment of some personal debts and liabilities of the said mortgagor, leaving thereby apparently the interests of that year unpaid, which were due on the 26th of February 1904.

That thereupon on the 3rd of May, 1904, Mr. William S. H. Lothrop, the mortgagee, instituted in the District Court of Ponce so called summary proceedings against the mortgagor for the sale of his property under the mortgage. That in those proceedings the only notice given to the mortgagor was a requirement of payment of the interest, in order to avoid the sale of the mortgaged property. That neither was the mortgagor served with a summons nor with a copy of the complaint. That the said proceedings were against him alone, not joining his wife with him in the proceedings. That on the 3rd of May, 1904, when the order of requirement of payment against him was made by the Court of Ponce, only two judges of the three, then constituting the Court, have signed that order. That on the 16th of June, 1904, another order signed by two judges only was made by that Court that the mortgaged property be offered at public auction. That no judgment was ever rendered in the said proceedings. But that nevertheless on the 30th of July, 1904, the Marshal of said Court

without authority thereto levied on the mortgaged property, and on the 12th of September 1904, sold it at public auction to Pedro Juan Rosaly, defendant herein, for the sum of $500.00 besides the costs, he making himself responsible for the payment of the mortgage to the mortgagee.

That in the notice of sale published in the local newspaper, there was not stated, as the Law requires, the value of the estate, given to it in the mortgage, in order that it may serve as a limit of the minimum offer to be accepted at the public auction, and that at the sale such valuation was also not taken in consideration.

It was further alleged by the mortgagor complainant, that in the summary proceedings the mortgage notes were not exhibited as required by the Law, and that they were at the time of the institution of the summary proceedings the property of other persons to whom they were endorsed and in the hands of those persons and not of the mortgagee, who therefore had no right to institute proceedings at all. That Rosaly was only Trustee of the other defendants.

The complainant Torres Zayas therefore asked the Ponce Court, to annul and set aside the orders made in the said summary proceedings and to declare that the said mortgaged property is still of right the property of the mortgagor.

The complainant also asked for judgment for the value of the rents and crops for the years succeeding the said summary proceedings, said rents and crops having been appropriated by the defendants herein. (*Record P.*) [1-11].

The defendants having demurred to the complaint the Ponce Court overruled said demurrer and the defendants then, with the exception of Mrs. Alice Lothrop, widow of Mr. W. S. H. Lothrop and his only heir, who never entered an appearance, filed their answer to the complaint, in which besides several specific denials of the complaint they put up several defences, to wit:—That the mortgagor has in the meantime sold the mortgaged property to one Alvarado, who manitested that he had no opposition to the cancellation of an inscription of ownership in the Registry of Property, as he could not pay the price of the auction sale; that the said

Alvarado has instituted similar proceedings to this against William S. H. Lothrop and that a judgment in favor of the said Lothrop was rendered by the Court; that the action now exercised is prescribed; and that Mr. Rosaly has satisfied to the holders of the notes Messrs. Lothrop Luce & Co. the sums due, and that therefore no judgment could be given without declaring the mortgage subsistent and the complainant obliged to pay. (*Record P.*) 25-28.

The complainant then specifically traversed the defence of prescription and also demurred to the defences put in the answer as to the sale to Alvarado. This demurrer was overruled by the Court. (*Record P.* 29-30.

One of the defendants, Mrs. Alice Lothrop, not being a resident of Porto Rico, the complainant upon the proper affidavits presented to the Court, obtained an order of service by mail and publication, which service was accordingly made, and said Mrs. Alice Lothrop not having entered an appearance at the stipulated time, her default was noted and a judgment by the Court against her prayed for by the complainant. (*Record P.*) 40-41.

The complainant presented to the Court an amendment to the complaint with certain particulars, which amendment was not permitted by the Court. (*Record P.*) 43-44.

The Court of Ponce rendered judgment against the complainant and in favor of the defendants, including the defendant Mrs. Alice Lothrop, who was duly summoned by substituted service in conformity with an order of Court, and who had not appeared to defend.

An appeal was then taken from the District Court of Ponce to the Supreme Court of Porto Rico, and said Supreme Court confirmed the judgment of the District Court.

## II.

## ASSIGNMENT OF ERRORS.

### First.

The Supreme Court of Porto Rico erred in considering that the summary proceedings instituted by the mortgagee against the mortgagor were authorized by the Law and Constitution then in force.

SECOND.

The Supreme Court of Porto Rico erred in holding that in the said summary proceedings there was no necessity of the service of a summons or a delivery of a copy of the complaint.

THIRD.

The Supreme Court erred in holding that the mortgagee could foreclose without being in possession or the ownership of the mortgage notes and without presenting them in the summary proceedings.

FOURTH.

The Supreme Court erred in considering the sale of the mortgaged property in public auction without a minimum type or valuation as a valid sale.

FIFTH.

The Supreme Court erred in holding the order of the sale signed by two judges only, as valid.

SIXTH.

The Supreme Court erred in holding the proceedings and sale valid without the consent or summons of the wife of the mortgagor.

SEVENTH.

The Supreme Court erred in holding that a clause of a contract written in a public document could under the Laws of Porto Rico be contradicted by oral testimony.

EIGHTH.

The Supreme Court erred in holding that the simulated sale by Torres Zayas to Alvarado deprived the first of the right of action to annul the summary proceedings.

NINTH.

The Supreme Court erred in holding that the declaration of Alvarado, that he could not pay the price at the auction sale,

and that therefore he does not oppose the inscription in favor of Rosaly, deprived the mortgagor of the right of action to annul the summary proceedings.

TENTH.

The Supreme Court erred in holding that the Marshal had authority to sell the mortgaged property without a judgment having been rendered by the Court and registered in the Clerk's Office.

ELEVENTH.

The Supreme Court erred in sustaining the overruling of the second exception of the plaintiff in the Bill of Exceptions.

TWELFTH

The Supreme Court erred in sustaining the overruling of the third exception of the Bill of Exceptions.

THIRTEENTH

The Supreme Court erred in sustaining the overruliug of the fifth exception of the Bill of Exceptions.

FOURTEENTH

The Supreme Court erred in sustaining the overruling of the sixth exception of the Bill of Exceptions.

FIFTEENTH

The Supreme Court erred in sustaining the overruling of the seventh exception of the Bill of Exceptions.

SIXTEENTH

The Supreme Court erred in sustaining the overruling of the eighth exception of the Bill of Exceptions.

SEVENTEENTH

The Supreme Court erred in sustaining the overruling of the ninth exception of the Bill of Exceptions.

EIGHTEENTH

The Supreme Court erred in sustaining the overruling of the tenth exception of the Bill of Exceptions.

NINETEENTH

The Supreme Court erred in rendering judgment confirming the judgment of the District Court of Ponce.

III

## CONSIDERATION OF THE LAWS APPLICABLE TO THE CASE AT BAR.

In order to properly understand the merits of the case at bar, it is necessary to review and bear in mind the changes which were made in the Laws of Porto Rico, specially during the time of the summary proceedings on the mortgage, to annul which proceedings the case at bar was instituted.

When the Island of Porto Rico was invaded by the American Army, the Commanding Officer announced that all the laws then in force will be continued in force except as afterwards changed by the Military Government. Changes were made by Military Orders up to the time of the establishment of the Civil Government of Porto Rico by the Congress of the United States in an Act temporarily to provide Revenues and a Civil Government for Porto Rico, and for other purposes, passed April the 12th, 1900. Section 8 of said Act provides "that the Laws and Ordinances of Porto Rico now in force shall continue in full force and effect except as altered, amended, or modified hereafter, or as altered or modified by Military Orders and Decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the Statutory Laws of the United States not locally inapplicable, or the Provisions thereof, until altered, amended, or repealed by the Legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States."

The chief among those laws in force at that time were: The Civil Code of 1889, the Code of Commerce of 1885, the Mortgage Law of 1893 with the Regulations adjunct thereto, and the Law of Civil Procedure of 1885. On the 1st of March, 1902, an amended Civil Code was enacted by the Legislature of Porto Rico, and on the 1st of July, 1904, while the sum-

mary proceedings on the mortgage which are sought to be annuled in the case at bar, were in tramitation and pending in the District Court of Ponce, a new Code of Civil Procedure, passed by the Legislature of Porto Rico, went into effect. It will be therefore very material in this case to inquire how far these summary proceedings on the mortgage were affected by the change of the Law of Civil Proceedure during their tramitation and while they were pending.

The old Mortgage Law and Regulations and the old Commercial Code are still in force in Porto Rico, with the exception of very slight and few amendments made either by Military Orders or by the Legislature of Porto Rico.

Having called the attention of the Court to the state of legislation in Porto Rico at the time of the pendency of the summary proceedings on the mortgage, which are sought to be annuled, we pass to the questions of Law involved in the consideration of the errors, by us assigned to have been committed by the lower Courts in the case at bar.

That this Court has jurisdiction on this appeal is evident from the record, as the property claimed and involved is far exceeding the value of $5,000.00.

Royal Insurance Company *vs.* Martin, 192 U.S. 149.

We will then proceed to consider: first, the constitutionality of the Law authorizing the summary proceedings on mortgages; second, the nullity of those proceedings on account of their being not in conformity even with the requirements of the Laws then in force; third: errors committed by the Court in application of the Law to the facts as found by the Court; and fourth, errors committed by the Court in the ruling on the evidence, which materially affect the findings of fact and the result of the case.

I

**The Summary Proceedings under the Mortgage Law of Porto Rico are contrary to the Provisions of the Constitution of the United States.**

The summary proceedings providing for the sale of mortgaged property are specified in the General Regulations for the

Execution of the Mortgage Law for Cuba, Puerto Rico and Philippines. Art. 175 of these Regulations provides as follows: "The summary proceedings referred to in this Section cannot be stayed by means of proceedings in the nature of a demurrer, nor by any other proceedings at the instance of the debtor or of the third party in interest, nor that of any other person presenting himself as interested party, except in the following cases: "Naming as exception first, the documentary proof of a criminal proceeding on account of the forgery of the mortgage document; second, a claim by a third person with a recorded title to the estate in question; third, a certificate of the Register of Property of the cancellation of the mortgage in the books of the Registry.

It will therefore be seen that there is really no defence to the proceedings on a mortgage under this law. The mortgagor cannot have his day in Court. The Court virtually does not act as a Court, and simply as an executive officer would act. It is therefore depriving a man of his property without due process of Law, within the meaning of those words in the Constitution.

That the general guarantees of life, liberty and property contained in the Constitution of the United States apply to Porto Rico, can be seen from the following statements in the opinion issued by Mr. Justice Brown in the case of Downes v. Bidwell, 182 U.S. 277 and 282. On the former page we read as follows: "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of the time and place, and such as are operative only 'throughout the United States' or among the several States."

Thus, when the Constitution declares "no bill of attainder or ex post facto law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of that description.

Perhaps, the same remark may apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people to peacefully assemble, and to petition the government for redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application."

On page 282 in the same opinion we read: "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's conscience; the right to personal liberty and individual property; to freedom of speech and of the press, the free access to courts of justice; to *due process of law* and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights of citizenship, to suffrage, Minor v. Happersett, 21 Wall, 162, and to the particular methods of proceedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals."

It is unnecessary for us to discuss the point that all the Laws in force in Porto Rico are so only through the Act of Congress which declared them after the change of sovereignty to be such laws in the above cited Article 8 of the Organic Act of Porto Rico of April the 12th, 1900, and that therefore all these laws are only as far in force and effect as they do not contradict or

annul the General Guarantees of the Constitution for life, liberty and property.

We will now quote here one of the best definitions given by this Supreme Court to the words "*Due Process of Law.*"

"It is sufficient to observe here, that by "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode proscribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them *an opportunity to be heard* respecting the justice of the judgment sought. The clause in question, therefore, means that there can be no proceedings against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Due process of law signifies a right to be heard in one's defence. Hovey *v.* Elliot, 167, U.S 409.

The essential elements of the process of law are *notice and opportunity to defend.*

Simon *v.* Craft, 182 U.S. 427.

An opportuniiy of defence is an essential element in the conception of due process of law.

Health Department *v.* Trinity Church, 17 N.Y. Supp. 510, 512.

Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity *to be heard, and to defend, enforce,* or *protect his rights. A hearing or an opportunity to be heard is absolutely essential, and a necessity of notice of the time and place of such hearing is conclusively implied.* Stuart *v.* Palmer, 74 N.Y., 183,189.

"Law of the land," as used by the Constitution, requires a hearing before the condemnation of property, and judgment before dispossess on. Ieck *v.* Anderson, 57 Cal. 251, 253.

The rule of justice which forbids the taking of property

except according to the law of the land, means that there shall be no taking, no condemnation, before *hearing*.

First Nat. Bank v. Swan, 3 Wyo., 356.

Due process of law requires that the party shall be properly brought into Court, and that he shall have an opportunity when there, to prove any fact which, according to the Constitution and the usages of the Common Law, would be a protection to him or his property.

People v. Essex County Supr's., 70 N.Y., 228, 234.

Wright v. Cradlebaught, 3 Nev., 341, 349.

State v. Cutshall, 110 N.C. 538.

The numerous attempted definitions of due process of law to be found in the books, when summed up, amount at least to but different expressions of the principle that every one is entitled to have notice of any proceeding by which his life, liberty or property may be affected, and to be admitted to make a defence in a proceeding which, following the forms of law, is adapted to the nature of the case, and is in conformity with natural aud inherent justice.

Hood River Lumbering Co. v. Wasco County, 35 Or. 498.

"Due process of law" means the same as the Law of the Land, and as a general rule, involves an opportunity before a proper Tribunal, under an established procedure, to make contest in defending or enforcing a legal right.

Simmons v. Western Union Tel. Co., 63 S.C. 525.

The phrases "Law of the Land" and "Due process of Law," as used in Constitutions, are similar in meaning. They both imply a judgment by an authorized Tribunal *after an opportunity for a hearing*. There must be some sort of a Tribunal, some opportunity for a hearing, and some sort of an adjudication. These requirements at least are ingrained in the fundamental law. The Legislature cannot make that "Due process of Law" or the "Law of the Land" which is not that in the Constitutional sense.

BENNET v. DAVIS, 90 Me. 102.

"Due process of law" necessarily implies and includes the right to answer and to contest a charge.

BABCOCK v. CITY OF BUFFALO, Sheld. 317, 340.

While it is practically impossible, and certainly unwise, to attempt to give a concise and comprehensive definition of "Due process of Law" and "Law of the Land," it is certain that notice to the parties to be affected of the claim against them, *and an opportunity to be heard upon it*, are essential elements of every proceeding in a Court of Justice which can be said to constitute due process of law or to be in accord with the Law of the land. The basic principle of English Jurisprudence is, that no man shall be deprived of life, liberty or property without "due process of law," without a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the Court if the claim is sustained; *and the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it if a question of fact is in issue; and if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed.*

Judicial orders or judgments affecting the life or property of citizens in the absence of such a notice and opportunity to be heard to the party affected, are violative of the fundamental principles of our laws, and cannot be sustained.

In *re*-Rosser, 101 Fed. 562, 567.

While the phrase "Due process of Law," as applied in this country, is more or less controlled by its application to the facts and conditions of the particular case, yet in its universality it implies the right of the person to be affected by a judicial proceeding against him *to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard by testimony or otherwise; and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, there is not due process of law.*

Holden v. Harvey, 167, U.S. 366.

Many definitions of "Due process of Law" have been attempted, but it is believed they all come to this:—That a party shall have his day in Court—trial—which means the right of each party, plaintiff or defendant, to introduce evidence to establish his right to recover on one hand, and to establish his defence of the part of the other; after which comes judgment.

Any judgment which is rendered without these modes of proceedure, or in disregard of them, is not *due process of Law*, any other proceedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial.

Jensen v. Union Pac. R. Railway Co., 6 Utah, 253.

"Due process of Law" implies notice and hearing or an opportunity to be heard. *Where such is not required or provided for in the act, such act is unconstitutional, even though notice of the fact of the thing to be done was given.*

In *re*-Jensen, 59, N.Y. Supp. 653-655.

It is not enough that the parties may by chance have notice or that they may as a matter of favor have a hearing. *The law*

*must require a notice to them, and give them the right to a hearing, and an opportunity to be heard.*

San Mateo County v. Southern Pac. Railway Co., 13 Fed. 722,752.

We do not wish to burden the Court with more citations, although we could triplicate them.

Any law which deprives a man of his property, without providing for the opportunity of a full defence is unconstitutional, and as we have established before by quoted decisions of this Court, the provision of the Constitution for due process of law does apply to Porto Rico. We have also established that the Laws of Porto Rico have no other origin, be they the old Laws, or be they the Laws enacted after the change of sovereignty, except the authority of the Congress of the United States, which makes them the Law of Porto Rico by the Organic Act, or the so called "Foraker Act," cited above.

The appellant here, the plaintiff in the Court below, was deprived of his property without due process of law, as the Law itself under which he was so deprived provided that he should have no defence interposed and should have no hearing, neither argument, either on issues of fact or of law. The Court below should therefore, have declared the so called judgment against him null and void.

2.

**The provisions of the Mortgage Law itself were not complied with in the proceedings to foreclose the mortgage and therefore those proceedings are null and void.**

In the first place, the District Court of Ponce never acquired jurisdiction over the then defendant in the foreclosure proceedings, now plaintiff and appellant. The Regulations for execution of the Mortgage Law of 1893, in force in Porto Rico at the time of the foreclosure proceedings, provide in Art. 176, as follows:—"The provisions of the law of Civil Procedure

in force in Cuba, Porto Rico, and the Philippines shall be applicable to these proceedings as supplementary, when not in conflict with the provisions contained in the Mortgage Law and these Regulations."

The Law of Civil Proceedure in 1885, in force in Porto Rico at the time of these foreclosure proceedings, provides in Art. 524, as follows:—"After the complaint, together with the necessary copies, has been presented, it shall be referred to the defendant or defendants, who shall be summoned to appear in the action, within a period of nine days, which cannot be extended."

As this fundamental requirement of the Law of Civil Proceedure and, we may say of any and all laws of proceedure, is not in conflict with any provisions contained in the Mortgage Law Regulations, it was certainly obligatory. That it was not complied with can be seen from the findings of fact which constitute a part of the record in this case.

Therefore the Court never had jurisdiction to render any judgment in the foreclosure proceedings.

SECOND.—Art. 169 of the Regulations for the execution of the Mortgage Law provides as follows:—"The following must be presented with the first document drawn in the proceedings: First . . . Second, the instrument or instruments of the credits, with a memorandum of their record, and with the formalities required by the Laws of Civil Proceedure for authorizing a writ of execution." As it can be seen from the findings of fact, the mortgage notes have never been presented with the complaint in the foreclosure proceedings. Moreover, they have been endorsed to other persons and it is therefore presumed that they still were in the hands of such other persons, and that the plaintiff in the foreclosure proceedings was then not the real creditor and therefore not entitled to the foreclosure of the mortgage.

See also Art. 128 of the Mortgage Law, and Art 153 of the same.

Art. 128 requires expressly that the judicial proceedure shall consist in a complaint accompanied "by the instrument constituting the debt."

Art. 153 reads as follows:—"In a mortgage created to guarantee negotiable obligations or deeds to bearer, when the mortgage interest is alienated or assigned, it shall be understood that the latter is transferred together with the obligat ons or with the deed, it being unnecessary to give notice thereof to the debtor, or to record the transfer in the Registry."

THIRD.—Section 1328 of the Civil Code of 1902 provides as follows:—"Notwithstanding the power which the husband has as administrator, he shall not have the power to give, to sell and to buy or bind for a consideration the real estate of the conjugal partnership without the express consent of the wife. Every sale or agreement which the husband may make in respect to the said property in violation of this Section and the other provisions of this Code, or in fraud of the wife, shall be null and shall not prejudice her or her heirs."

Section 1322 of the same Code provides:—"All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife."

In the foreclosure proceedings the wife of the mortgagor has not been notified or cal'ed in, nor has her consent to the sale of the property been obtained.

FOURTH.—The Mortgage Law in Art. 127, provides:—"In the mortgage shall appear the value of the estate as appraised by the contracting parties, *which shall serve as a basis for the only judicial sale which can take place, if, the period of the loan having expired, it does not appear in the registry of property that said loan has been paid.*"

The same is provided in Art. 172 of the Regulations for the execution of the Mortgage Law in which article it is expressly provided of the obligations on the mortgage, that "Their total amount shall be the minimum acceptable at the public sale" and that the notice of sale shall state so.

That a sale under the Mortgage Law in the epoch of the mortgage proceedings referred to, without fixing this amount as a minimum bid, was null and void, has been repeatedly decided by the Supreme Court of Porto Rico. (José Rosado v. Registro de la Propiedad, decided 20th of February, 1905.)

Emilio Jimenez v. Julio Brenes, decided 8th of February, 1905.

That these requirements of the Mortgage Law have not been complied with in those foreclosure proceedings can be seen from the findings of fact, a part of this record.

In the case of José Rosado v. Registrador de la Propiedad de Caguas, the Supreme Court of Porto Rico says:—"The summary proceeding established by the Mortgage Law in order to foreclose mortgage credits is an essential and integral part of that law which has not been abrogated by the new Code of Civil Proceedure, neither by any other legal disposition, and therefore while it exists Art. 127 of said law, to the effect that in a mortgage document shall be stated the value of the property on which the contracting parties have agreed, in order that it may serve as a basis for the judicial sale in case the payment of the mortgage in due time is not inscribed in the Registry of the Property, must be complied with."

In the case of Emilia Jimenez v. Julio Brenes Aponte, the Supreme Court of Porto Rico, says: "We have already declared that the said summary proceeding has not been abrogated by the new Code of Civil Procedure, and we have stated so on the 2nd of February, 1905, in the appeal interposed by José Rosado Canas against a note put by the Registrar of Property of Caguas, and we have not encountered any reasons whatever which could change our criterium."

Fifth.—All the orders or so called judgments in the foreclosure proceedings referred to were signed by two judges only. The Court at that time consisted of three judges, and although it may be true that the majority of two is sufficient as against the third to render a judgment, but still it is necessary and indispensable that all the three judges shall take part in the trial or vote, although one of them may dissent.

The District Courts of Porto Rico, as constituted at the time of the referred foreclosure proceedings, were instituted by general orders No. 118, on August the 16th, 1899, under the Military Government of Porto Rico No jury trial was provided in said order. Article 10 of said order reads as follows: "Each District Court will be composed of three judges, one of whom shall be presiding Judge, and who jointly shall constitute a bench for civil and criminal business." It will be seen from the word "jointly" that a Court of two judges only was not properly constituted.

It was so held by the Supreme Court of Porto Rico, in the case of the People of Porto Rico v. Pedro S. Battistini, in which the Court says that: "The appeal could not proceed, only because a proper exception was not noted to the substitution of the third judge by a lawyer." Now we want to state that in our case no exception was necessary or even possible, because the proceeding was without permission to us to take part in it, or to be heard at all.

Sixth.—There was never a proper judgment ordering the sale of the property rendered in the said foreclosure proceedings. As it can be seen from the findings of fact in this record no such judgment could be found in the record of said proceeding in the Ponce District Court, neither in the judgment books or the judgment roll or in any minutes or writings in said Court.

That except in case of the loss of the record, the record itself is conclusive can be seen from Greenleaf on Evidence, Vol. 1, Art. 275, note 305 G., citing various decisions.

Seventh.—There was only one public auction in the foreclosure proceedings, contrary to the provisions of Art. 172 of the Regulation for the execution of the Mortgage Law, which provides for three public auctions. Besides the sale took place within 18 days and not in the term of 20 days as provided in the said Art. 172 of the Regulations.

It will be seen that even if the summary proceedings of foreclosure provided for by the Mortgage Law of Porto Rico

should have been valid under the Constitution and considered "due process of law," which it is certainly not, as it gives no opportunity for defence, still that very same law was disregarded in so many of its vital provisions that the judgment or foreclosure is null and void for failing to comply with all such provisions.

Moreover the District Court of Ponce had no jurisdiction as we stated before for the reason that the mortgagor has never been properly summoned, and therefore all the proceedings of said Court are null and void.

We quote from Freeman on Void Execution, Judicial and Probate Sales, Section 2.: "A void judgment, order or decree, in whatever Tribunal it may be entered, is in legal effect nothing." "All acts performed under it, and all claims growing out of it, are void." "Hence a sale based on such a judgment has no foundation in law. It must certainly fall. Judicial proceedings are void when the Court wherein they take place, is acting without jurisdiction."

Section 5 *idem.* says: "Jurisdiction of the defendant is obtained by his voluntary appearance in the action, or by the service of process upon him. If a defendant neither appears, nor is served with process, a judgment against him is void."

"The proceedings may be in rem. But if notice is exacted by the Statute, either by publication, or by personal service of a citation, a substantial compliance with the statutes is a prerequisite to obtaining authority to proceed."

Beckett v. Sullivan, 7, Cal. 215.
Gray v. Howes, 8 Cal. 562.
Randolf v. Bryan, 44 Cal. 370.

3.

**A Clause in a contract incorporated in a public instrument cannot be modified or extinguished except by another writing contained in a public instrument under the Law of Porto Rico.**

There is a Statute of Fraud in force in Porto Rico, similiar

to the Statutes of Fraud enacted in the different States of the Union. It is chiefly contained in Section 1247 of the Civil Code of Porto Rico, which reads as follows: "The following must appear in a public instrument:

1. Acts and contracts the object of which is the creation, modification, or extinction of property rights on real property."

The end of the Section cited reads as follows: "All other contracts, in which the amount of the prestations of one of the two contracting parties exceeds $300.00, must be reduced to writing even though it be private".

It will be seen that, under the law of Porto Rico, clause 9 of the mortgage, which provides that all the money realized from the sale of the coffee of the mortgaged estate must be applied by the mortgagee's Trustee first to the payment of the interest due on the mortgage, and the remainder only to satisfy other debts, could not be proven to be changed except by a new contract in writing, incorporated in a public instrument.

It was therefore error for the Court to consider that that clause has been changed orally. It follows that, the clause still being in effect, the interests due on February 1904, by the mortgagor to the mortgagee were fully paid as the value of the coffee delivered by the mortgagor to the Trustee of the mortgagee on that date was more than sufficient to pay the interest then due. Therefore the proceeding to foreclose was a fraudulent proceeding, as the Trustee of the mortgagee had no right to appropriate the money realized to any personal liability of the mortgagor and to make appear that the interests on the mortgage were due, contrary of the stipulations in clause 9 of the Mortgage.

4.

**The Transfer of the Property by the Mortgagor to to Alvarado, being a Simulated Transfer, does not deprive the Mortgagor of his Rights as against the Mortgagee.**

As can be seen from the findings of fact the sale of that property to Alvarado was a simulated sale, without any intention

to defraud anybody, as the mortgage to Lothrop was mentioned and described in the instrument of sale. In that instrument of sale there was also instituted a mortgage for the purchase money in favour of Marcelino Torres, the plaintiff and appellant, which virtually left him the real interested party as far as the mortgage to Lothrop was concerned. It was further proven that said simulated sale was rescinded, first orally and then by a public instrument.

It is therefore obvious that Macelino Torres, the mortgagor lost no rights whatever as against Lothrop, mortgagee.

The fact that Alvarado was called in by the Court in the proceedings of the foreclosure of the mortgage by Lothrop, and that Alvarado declared, that he, not being able to pay the auction sale price, makes no objection to the deed to Rosaly the purchaser at the auction sale, does not change the position of the parties in any respect whatever, as Mr. Rosaly, the purchaser at the auction sale, was not a third party, but a Trustee of the mortgagee and his commercial associates in the firm, who had full knowledge of all the clauses of the mortgage and of all the facts in the case, including the fact that the interests on the mortgage at the time of the foreclosure were fully paid.

There is no innocent party in this case who could have suffered any through the simulated sale of the property by Marcelino Torres to Alvarado, for whatever purpose, which is immaterial here, that simulated sale was made.

Therefore, Marcelino Torres has not lost any right to the said property, which he could not now claim under the Law.

5.

**One of the Defendants, Mrs. Alice Lothrop, was in Default in the proceedings and therefore Judgment should have been given as against her**

Service upon this defendant, who was absent from Porto Rico at the time, was made by publication and mailing. But as this is a proceeding in rem, in its nature, such service, authorized by the Code of Civil Proceedure in Porto Rico

Section 94 and 95, was valid. This defendant did neither appear nor answer. And therefore judgment should have been entered against her according to Section 194 of the said Code Civil Proceedure subdivisions 2 and 3.

The Court, therefore, erred in not entering judgment against her.

6.

## ERROS COMMITTED BY THE COURT IN THE RULINGS UPON THE EVIDENCE

The error as far as the rejection of the testimony offered to which the second exception of the Bill of Exceptions refers is obvious.

The third exception of the Bill of Exceptions refers to the admission of the testimony as to the change of the clause 9 of the mortgage made according to the only witness, Mr. Rosaly one of the defendants, *as it appears to him*, after the mortgage was instituted in a public instrument, by and through an oral agreement. It is clear that under Section 1247 of the Civil Code of Porto Rico such evidence is not admissible, as it would cater to possibilities of fraud. Such kind of testimony is excluded by the Statutes of Fraud of every State and by the general policy the Law, as well as by the specific provisions of the Code of Porto Rico.

The same reasoning refers to the exception ten of the Bill of Exceptions.

The exception seven of the Bill of Exceptions refers to the refusal of the Court to admit testimony as to the character of the instrument of sale made by Marcelino Torres to Alvarado, the same as the exception eighth of the Bill of Exceptions.

The error of the Court in refusing to admit such testimony is evident, as the Law of Evidence, in Art. 25, provides that where the validity of the agreement is in dispute, oral evidence may be given as to that fact. See also Art. 28 of the same Law of Evidence of 1905.

As to the ninth exception of the Bill of Exceptions, which refers to the erroneous admission by the Court of the testimony of the attorney for the defendants, a former judge of the Ponce District Court, as to the fact that he made an order of sale in the foreclosure proceedings, while such an order or judgment is not to be found in the records of said Court, neither in the minutes, nor in the judgment roll, nor in any writing in said Court, and specially in view of the fact that the record has not been lost and is found complete and intact without any erasure or any other defect or anything missing, it is obvious that such testimony should not under the circumstances have been allowed.

Den et dem. Weatherhead *v.* Baskerville, 11 How. 329.
Minor *v.* Tillotson, 7 Pet. 99.
Bouldin *v.* Mossie, 7 Wheaton 122.
Simpson *v.* Dall., 3 Wall. 460.

The errors committed by the Court and noted in the rest of the exceptions are just as evident as those discussed, and in consideration of those errors alone, the judgment of the lower Court should be annulled.

7

Before closing, we wish to discuss some of the special defences made in the answer of the defendants to the complaint.

First, as to the third defence of the answer, that Mr. Alvarado, to whom a document of sale was made by Marcelino Torres, has consented to the auction sale, we want to say that, as can be seen from the Findings of Fact, it was not a real consent freely made, but a forced one, as the reason for it is given in the same document which contains the consent, that is to say, that Mr. Alvarado did not have then the money paid at the auction sale, and therefore could not do anything except permit the deed to Rosaly to be inscribed in the Registry. Besides, this act of Alvarado could not prejudice in any way the rights of Marcelino Torres to claim his property and damages for the spoliation thereof as against the defendants herein.

The fourth defence of the answer pleads *res judicata*.

But, from the evidence, it appears only that Mr. Alvarado has abandoned a suit brought by him and an injunction asked by him as against Mr. Lothrop, and the Court's order was simply a non-suit on account of want of appearance of the plaintiff, as provided for in Section 192 of the Code of Civil Proceedure of Porto Rico, sub-division 3. It will be seen by reading said Section that no judgment can be given upon such a non-suit, and only upon a dismissal mentioned in the first two sub-divisions of said Section. Such an order is certainly not of the nature of *res judicata*.

The fifth defence of the answer alleges prescription, citing Articles 37 of the Mortgage Law, 140 of the Code of Civil Proceedure, and 1869 of the Civil Code.

Art. 37 of the Mortgage Law applies only to actions for rescission or determination of title where a third person is involved and where such third person was not a party to the fraud, and where the causes are not duly expressed in the Registry and where the suits are brought for the purpose of defrauding creditors. There is nothing in the case at bar which could make applicable to it said Article of the Mortgage Law. There are no third innocent parties in this case, and Mr. Rosaly the defendant and purchaser of the mortgaged property at the auction sale, according to his own testimony, acted in behalf of Mr Lothrop the mortgagor and his associates in the commercial firm, as their agent and Trustee, and he knew of all the facts of the case, including the fact that the interests were not due at the time of the foreclosure, as he is the only one witness as to the pretended change of clause 9 of the mortgage.

Section 140 of the Code of Civil Proceedure of Porto Rico does not apply either, as the term of the six months given to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertance, surprise, or excusable neglect, or the term of one year for a party to answer to the merits of the original action where such party has not been personally served with a summons, cannot apply

to the case at bar, as the law did not allow any defence to the merits at all in the summary proceedings.

Neither can apply Art. 1869 of the Civil Code which prescribes one year for actions to recover or retain possession, and for actions to demand civil liability for grave insults or calumy and for obligations arising from fault or negligence, specially mentioned therein.

The action in the case at bar was brought under Art. 175 of the General Regulations for the Execution of the Mortgage Law for Cuba, Porto Rico and the Philippines. The provisions of this Article are literally as follows: "All other action that may be brought by the debtor as well as by the third parties in interest and other interested persons, including those regarding the nullity of the title or of the proceedings, or regarding the lapse, constitution, extinction, or amount of the debt, shall be discussed in the proper final trial, without ever causing a stay of tho summary action for posssession or avoiding them. The competency to take cognizance of these declaratory suits shall be determined by the usual rule." This refers to rule laid down in the Old Law of Civil Proceedure Art. II.

As the summary proceedings provided for in said Article of the Regulations are special proceedings under the Mortgage Law which simply provides that the summary proceedings shall go on without any defense and that an action may be separately and independently of those proceedings brought to recover the property or damages therefore, it is clear that General Provisions of Art. 1869 of the Civil Code about recovering possession or fault or negligence, do not apply to the case at bar, as neither do the other Articles cited in the answer of the defendant herein. The only prescription applicable is that for real action which has not yet expired.

In *resumen* : the plaintiff Marcelino Torres has been deprived of his property, first : without due process of law, that is to say under a Law which is contrary to the Provisions of the Constitution guaranteeing life, liberty and property; second : in a proceeding irregular in every respect, as it did

not comply even with that inconstitutional Law, a proceeding in which there was no jurisdiction in the Court for want of service, in which no judgment was ever rendered according to Law, in which two judges only of a Court of three, who could act only jointly under the law, have acted alone, in which a sale took place without judicial authority and contrary to the Provisions of the Law providing for a mortgage sale; third, in a proceeding in which it was alleged, that interests on the mortgage were due, while they were really paid.

The action instituted in the case at bar is an action specially provided for such cases by the same Mortgage Law of Porto Rico and has not prescribed. There is no third party or innocent purchaser in this case as defendant Rosaly acted only as Trustee or agent of the mortgagee and knew of all the facts of the case including the fact of the payment of interests.

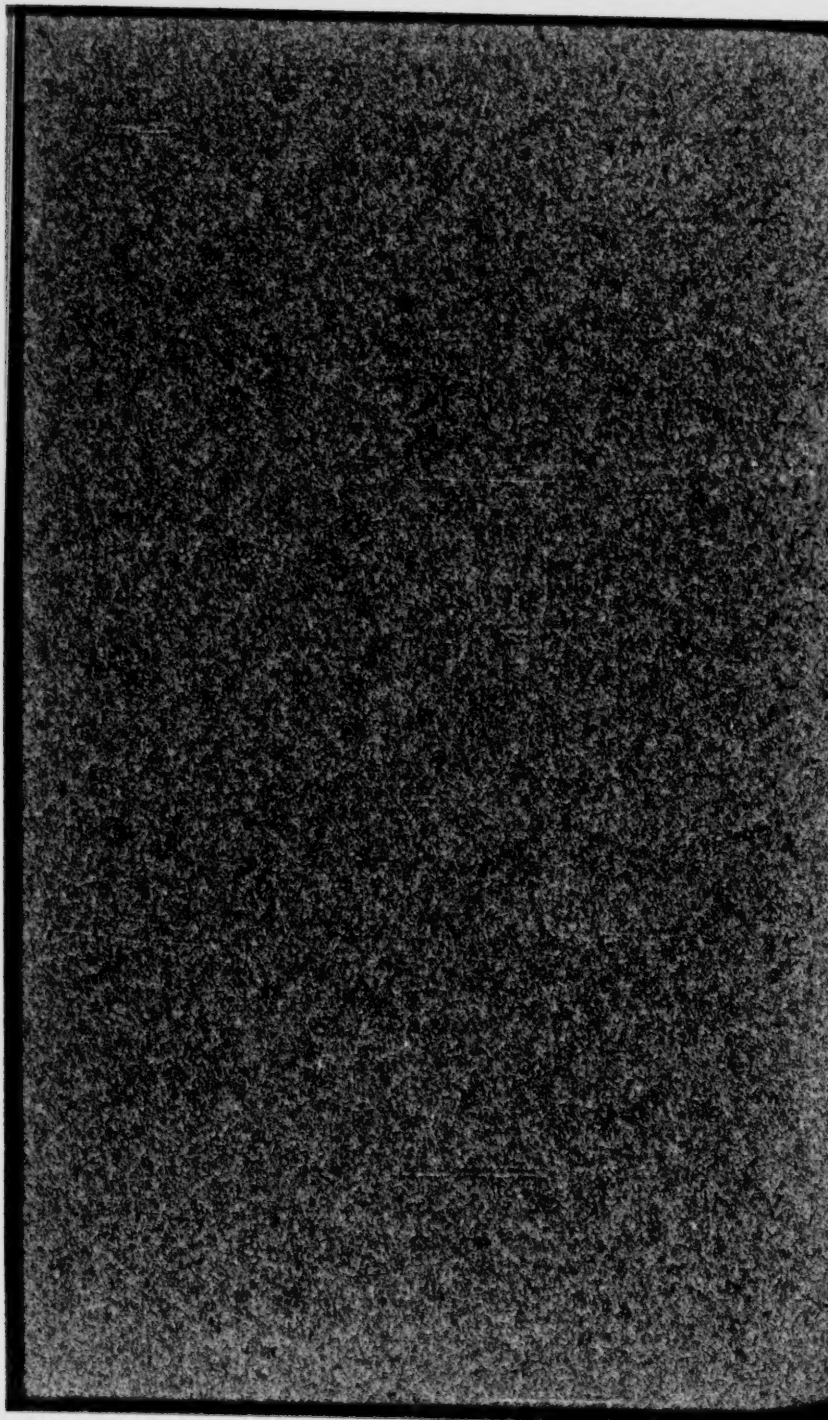
A clearer case of fraud could never be established.

The learned Court below has nevertheless refused to annul those summary proceedings, contrary to the Law, and said learned Court has also committed numerous errors in the rulings upon the testimony offered, for which errors alone the judgment appealed from should be revoked.

We therefore, respectfully submit that the judgment of the Supreme Court of Porto-Rico herein be set aside and that a judgment be ordered in favor of the appellant herein, according to justice.

CHARLES M. BOERMAN,
*of Counsel for the Appellant.*

[redacted]



# Supreme Court of the United States

OCTOBER TERM, 1913

No. 168

MARCELINO TORRES ZAYAS,
*APPELLANT AND PLAINTIFF IN ERROR,*

*v.*

LOTHROP, LUCE & COMPANY, PEDRO JUAN ROSALY CAPO, AND ALICE LOTHROP,
*APPELLEES AND DEFENDANTS IN ERROR*

**On Appeal from and In Error to the Supreme Court of Porto Rico**

## BRIEF FOR LOTHROP, LUCE & COMPANY AND THE HEIRS OF PEDRO JUAN ROSALY CAPO, APPELLEES AND DEFENDANTS IN ERROR

MALCOLM DONALD
*Of Counsel for Lothrop, Luce & Company and the Heirs of Pedro Juan Rosaly Capo, Appellees and Defendants in Error*

BOSTON
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1913

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# In the Supreme Court of the United States

**OCTOBER TERM, 1913.**

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MARCELINO TORRES ZAYAS, *Appellant and Plaintiff in Error,*

*v.*

LOTHROP, LUCE & COMPANY, PEDRO JUAN ROSALY CAPO, AND ALICE LOTHROP, *Appellees and Defendants in Error.*

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*On Appeal from and in Error to the Supreme Court of Porto Rico.*

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## BRIEF FOR LOTHROP, LUCE & COMPANY AND THE HEIRS OF PEDRO JUAN ROSALY CAPO, APPELLEES AND DEFENDANTS IN ERROR.

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### I.

### THE FACTS.

The appellant, Marcelino Torres Zayas (the plaintiff in the lower court), instituted this suit on January 15, 1908, in the District Court for the Judicial District of Ponce. The prayer of the bill is for a decree declaring that certain proceedings foreclosing a mortgage on a plantation of the appellant were null and void, and that

said property still belongs to the appellant, and directing that he be put in possession thereof. The bill also prays an accounting of profits and damages against either Alice Lothrop or Pedro Juan Rosaly.

The District Court dismissed the appellant's suit and affirmed the validity of the foreclosure proceedings. Torres Zayas thereupon appealed to the Supreme Court of Porto Rico, where the judgment of the District Court was affirmed. Thereupon he took the present appeal and writ of error to this court.

By the Act of April 2, 1874, C. 80, Sec. 2, 18 Stat. 27–28, which governs writs of error and appeals from Porto Rico, the present case can come before this court only on appeal, and the writ of error must therefore be disregarded. On appeal the findings of fact of the Supreme Court of Porto Rico must be accepted, and, therefore, the only questions which can be raised are questions of law apparent on the face of the record.

*Garzot* v. *De Rubio*, 209 U. S. 283.

On February 26, 1901, Torres Zayas, the appellant, entered into a mortgage contract with William S. H. Lothrop, in which he admitted that he owed said Lothrop forty-six thousand dollars ($46,000), which he agreed to pay February 21, 1905, with interest payable annually on February 21st of each year. As security, he executed a mortgage on the Semil plantation, which, by the mortgage deed, was given a valuation of forty thousand dollars ($40,000), and also a mortgage upon certain other property. The principal of the mortgage was represented by eight notes for five thousand seven hundred and fifty dollars ($5,750) each, the interest being payable annually

on February 21st and the principal being due February 21, 1905. This mortgage was duly recorded, and its validity is not questioned (Record, p. 70).

The mortgage further provided that all the produce of the mortgaged premises should be delivered to Messrs. De Ford & Company to be sold by them, they to deduct from the proceeds the amount of the interest to be paid annually to the creditors and to hand over any balance to Torres Zayas for the expenses and maintenance of the mortgaged properties, Torres Zayas being bound to apply to the payment of the principal of the debt such sum as might exceed the amount of said expenses (Record, pp. 70–71).

It appears that subsequently Torres Zayas needed money for the immediate expenses of the cultivation of his property, and by an oral agreement it was arranged that from the value of the products Zayas's current expenses should be paid before the payment of interest (Record, pp. 71, 56).

Interest was paid in 1902 and 1903. In 1904 the value of the products delivered to Messrs. De Ford & Company exceeded the interest due that year, but, in accordance with the above-mentioned oral agreement, Torres Zayas drew on the proceeds to meet his current liabilities, and did not leave sufficient to pay the interest for the year 1904; and Torres Zayas never made any payment to make up the deficiency (Record, pp. 71, 72, 56).

Accounts of the receipts from the plantation were rendered each month to Torres Zayas, and also accounts of his debits and credits, and Torres Zayas never questioned the correctness of these accounts (Record, pp. 71, 56).

On April 25, 1904, Lothrop instituted proceedings in the District Court of Ponce against Torres Zayas to

foreclose the mortgage upon the Semil plantation because of the above default in the payment of the interest due in 1904. A notification for payment of interest was made to Torres Zayas in these proceedings, but not to his wife (Record, p. 72).

On April 25, 1904, the same day that the foreclosure proceedings were instituted, Torres Zayas transferred the mortgaged premises to one Alejandro Alvarado, who mortgaged the same back to Torres Zayas for forty-seven thousand five hundred dollars ($47,500) (Record, p. 73).

On June 3, 1904, Alvarado, as owner of the Semil plantation, brought suit in the District Court, praying that the foreclosure proceedings brought by Lothrop be declared null, and he further asked for an injunction to stay the proposed auction sale of the premises. On August 5, 1904, the court ordered the suit brought by Alvarado dismissed, because it had been twice set for hearing and counsel had failed to appear (Record, p. 75).

The foreclosure proceedings brought by Lothrop resulted in a judicial sale of the property at auction on September 12, 1904. The purchaser was Pedro Juan Rosaly, who purchased for five hundred dollars ($500) plus the costs and expenses of the proceedings and the assumption of the mortgage in favor of Lothrop. Before receiving a deed of the property, namely, on September 5, 1905, Rosaly brought a petition in the foreclosure case, setting out that he was unable to obtain a proper deed of the property because of the fact that title to it was registered in the name of Alvarado; and an order was made by the District Court whereby Alvarado, as the then record owner of the property,

was required to make payment within ten days of the price of the sale of the Semil plantation, he being warned that if he failed to make such payment a writ would issue for the cancellation of his registration of ownership. Alvarado thereupon appeared in court, and formally stated that, although he had notified by his counsel an opposition to the petition, he had subsequently abandoned the same by failing to appear at the date set for the hearing thereof; and that he now desired to make known in a clear manner his acquiescence in the motion, asserting "that being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him [that is, by Rosaly] that the registration of ownership which he, Alvarado, had upon the said property should be cancelled." This statement was sworn to before the United States Commissioner (Record, pp. 74, 75).

Thereafter on October 7, 1905, the Marshal of the District Court of Ponce executed a deed of judicial sale of the Semil plantation to said Rosaly. Rosaly took title in trust for Lothrop, Luce & Company (Record, p. 73).

Rosaly having paid the amount of the mortgage indebtedness due on the original mortgage, formal proceedings were brought by Rosaly in May, 1906, which resulted in the cancellation of the original mortgage from Torres Zayas to Lothrop (Record, p. 75).

On April 20, 1907, Alvarado and the appellant, Torres Zayas, rescinded the deed of sale and mortgage from Zayas to Alvarado, made April 25, 1904. Torres Zayas testified at the trial that the transfer by him to Alvarado was a simulated sale (Record, p. 74).

Lothrop died before the present suit was brought,

and Mrs. Lothrop is his heir. No service was made on Mrs. Lothrop, who was a non-resident, except by publication.

The appellant, Torres Zayas, made no objection to the application of the proceeds of the crop by Messrs. De Ford & Company in 1904 to payment of his current liabilities, in accordance with his agreement, although he received monthly accounts showing the same, and no objection in any other respect to the foreclosure proceedings until nearly four years after the same were instituted, when he filed the present suit on January 15, 1908. He never offered to pay the principal of the mortgage on the Semil plantation, to wit, forty-six thousand dollars ($46,000), which was due in 1905 and which was paid by the appellees, nor the interest due thereon; nor did he offer to make any such payment in the present suit.

In the District Court the appellant contended that the proceeds of the crop should have been applied in 1904 by Messrs. De Ford & Company to payment of the interest due on the mortgage, and that they should not have permitted him to draw out said money in accordance with his oral agreement, and that, therefore, there was no default in the payment of interest in 1904. He further contended that in certain respects the procedure prescribed by the mortgage law was not observed in the foreclosure proceedings brought by Lothrop. Being unsuccessful in the District Court, on appeal to the Supreme Court he insisted upon these contentions, and further set up that the District Court had erred in certain rulings as to the admissibility of evidence. Being again unsuccessful, he has prosecuted the present appeal, in which he reiterates his previous contentions and further

contends, for the first time, that the Mortgage Law of 1893, under which the foreclosure proceedings took place, is unconstitutional.

## II.

## THE QUESTIONS INVOLVED.

It is believed that all of the arguments advanced by the appellant may be grouped under the following four heads:—

1. That the Mortgage Law is unconstitutional.
2. That the requirements of the Mortgage Law were not observed in the foreclosure proceedings instituted by Lothrop.
3. That the mortgage interest due in 1904 must be deemed to have been paid out of the proceeds of the crop of that year.
4. That the District Court erred in certain of its rulings as to the admissibility of evidence.

The appellees propose to meet these contentions by showing:—

1. (*a*) That the question of the constitutionality of the Mortgage Law is not open on this appeal, since it is raised for the first time in this court.

(*b*) That the Mortgage Law is constitutional.

(*c*) That appellant, through his privy, Alvarado, waived his right, if any, to object to the constitutionality of the Mortgage Law.

2. (*a*) That all the essential requirements of the Mortgage Law were observed in the foreclosure proceedings brought by Lothrop.

(*b*) That all informalities, if any, in the mortgage foreclosure proceedings and all objections based upon alleged irregularities and omissions in the conduct of such proceedings were waived when Alvarado, the grantee of appellant and the holder of record title to the mortgaged premises, at the close of the foreclosure proceedings appeared in the suit and formally stated that, "being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him that the record of ownership which he, Alvarado, had upon the said property should be cancelled."

3. (*a*) That the appellees are entitled to show that the mortgage interest due in 1904 was not in fact paid, and that the proceeds of the 1904 crop were not applied to such payment at the appellant's own request. In so doing they are not attempting to enforce the oral agreement, but merely refer to it as proof of the request.

(*b*) That there is nothing in the laws of Porto Rico to prevent the appellees proving the oral agreement and relying on it, if necessary.

(*c*) That the appellant is estopped to contend that the proceeds of the 1904 crop ought to have been applied to payment of interest due that year, since the non-application was at his request and for his benefit.

4. (*a*) That this court will not consider appellant's objections to the rulings of the trial court as to the admission or rejection of evidence, because appellant has neither specified the reasons for his objections nor stated what he intended to prove by the evidence which he claims was wrongfully rejected.

(*b*) That in any event no reversible error was committed in the admission or rejection of evidence.

The appellees will in addition rely upon the following equitable considerations applicable to the case at bar:—

5. (*a*) That the unwarranted delay of appellant in bringing this suit for the annulment of the foreclosure proceedings constituted such laches as to justify the refusal of his prayer.

(*b*) That appellant has not paid or offered to pay the mortgage debt on the plantation, and for this further reason his suit was properly dismissed.

## III.

## THE ARGUMENT.

### 1 (*a*).

### THE CONSTITUTIONALITY OF THE MORTGAGE LAW CANNOT BE QUESTIONED ON THIS APPEAL.

The question of the constitutionality of the Mortgage Law under which the foreclosure proceedings took place was not raised either in the District Court or in the Supreme Court of Porto Rico. (See Plaintiff's Bill of Exceptions filed in the District Court, Record, pp. 46–52; and Opinion of the Supreme Court, Record, pp. 52–57.)

It was raised for the first time in the assignment of errors from the decision of the Supreme Court of Porto Rico.

It is a well-recognized rule that objections not raised

in the lower court should not generally be considered in this court for the first time. If such objections could be considered, there would be no assurance that any litigation would ever end; for, should a judgment be reversed on such an objection and the case be again brought to the Appellate Court, some new objection might then be made, and the same process might be indefinitely repeated. It seems self-apparent that the judgment of a lower court should not be reversed for an error not called to its attention,—for error on a matter on which it did not express its judgment.

The above rule is applied by the Supreme Court of Porto Rico. Speaking of another alleged error in the present case, the Supreme Court of Porto Rico said,—

> "Furthermore, although this discrepancy was made an assignment of error, in the appellant's brief, such error was not put in issue by the pleadings, nor was it raised in the court below and it cannot be raised for the first time in the Appellate Court" (Record, p. 52).

As the present question of the constitutionality of the Mortgage Law was not raised in the District Court, the Supreme Court of Porto Rico, following the above rule, would not have considered the question on appeal to it. Therefore, if the Supreme Court of the United States should consider this question, it would pass upon a question which was not passed upon by the Supreme Court of Porto Rico, and which that court would doubtless have thought could not be properly raised for its consideration.

In *Walker* v. *Sauvinet*, 92 U. S. 90, 93, Mr. Chief Justice Waite said,—

> "The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below."

In *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50, Mr. Justice Brown said:—

> "No objection seems to have been raised in that court to the form of the judgment. In the assignments of error in the United States Court of Appeals for the Eighth Circuit no such question is raised and none alluded to in the opinion. Such objections could not be raised for the first time in this court. *Insurance Company* v. *Mordecai*, 22 How. 111, 117; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Wheeler* v. *Sedgwick*, 94 U. S. 1; *Wilson* v. *McNamee*, 102 U. S. 572; *Edwards* v. *Elliott*, 21 Wall. 532; *Clark* v. *Fredericks*, 105 U. S. 4.
>
> While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

The State courts have frequently held that the constitutionality of a statute cannot be questioned for the first time on appeal.

*Miller* v. *Thorpe*, 4 Colo. App. 559.
*Chiniquy* v. *People*, 78 Ill. 570.
*Hopper* v. *Chi., etc., R. Co.*, 91 Ia. 639.
*Gagnet* v. *New Orleans*, 23 La. Ann. 207.
*Baldwin* v. *Fries*, 103 Mo. 286.
*Purdy* v. *Erie R. Co.*, 162 N. Y. 42.

1 (*b*).

## THE MORTGAGE LAW OF PORTO RICO IS VALID AND CONSTITUTIONAL.

The appellant contends that the Mortgage Law of Porto Rico enacted in 1893, prior to the acquisition of Porto Rico by the United States, and under which the foreclosure proceedings took place, is unconstitutional in that it deprives mortgagors of their property without due process of law (Plaintiff's Brief, p. 9). The appellant in his brief has referred to only a portion of the provisions in this law relating to foreclosure.

### PROVISIONS OF THE MORTGAGE LAW OF 1893.

The method of foreclosing mortgages is provided for in the Mortgage Law, Articles 128–134 (War Department Translation, 1899), and in the General Regulations for the Execution of the Mortgage Law, Articles 160–176 (War Department Translation, 1899). The mortgagee bringing foreclosure proceedings must present to the judge of the proper court the instrument on which his claim is based, a certificate of the Register of Property declaring that the mortgage does not appear cancelled in the registry, and a statement of the net amount of the claim and of the exact amounts collected by way of interest or principal. This statement must be authorized by the signature of a lawyer, and the mortgagee agrees by instituting the proceedings to indemnify any loss or damage caused the mortgagor or third persons by malice or negligence in the true statement of facts (Regulations, Art. 169). If the judge who examines the petition and the documents on which it is based considers

them proper, he issues a decree notifying the mortgagor to make payment of the sum due within thirty days (Regulations, Art. 170). There are elaborate provisions for serving such notice on the mortgagor, or, if he is not within the municipal district, then on the person in charge of the estate, so that he may communicate it to the owner (Regulations, Art. 171). If the amount demanded is not paid within thirty days, the judge shall order that the mortgaged property be sold at public auction within the period of twenty days after notices have been given of such sale (Regulations, Art. 172).

Such sale cannot be stayed by means of proceedings in the nature of a demurrer, nor by any other proceedings at the instance of the debtor or by any other person presenting himself as an interested party except in the following cases:—

*First.* If documentary proofs are brought forward as to the existence of a criminal proceeding on account of the forgery of the mortgage instrument.

*Second.* If a third person enters a claim of ownership, accompanied by his title to the estate in question recorded in his favor prior to the entry of the debt of the claimant.

*Third.* If the certificate of a registrar is presented, stating that the mortgage is cancelled, or an authenticated copy of a public instrument cancelling the same, with a note of presentation in one of the registries (Regulations, Art. 175).

If the mortgagor desires to set up any defences other than those enumerated, he must set them up in what is nominally a collateral proceeding, or declaratory suit, which shall not stay the summary sale of the property. For his protection, however, he may demand that the

effectiveness of any final judgment in the suit be secured by the retention of the whole or of a part of the amount which would otherwise be delivered to the claimant in the summary proceedings (Regulations, Art. 175). He may further, as in every suit for the ownership of real property, or for the creation, declaration, modification, or extinction of any property right, demand that a cautionary notice be recorded in the registry (Mortgage Law, Art. 42). If such cautionary notice is recorded, the property or property rights which he claims must be conveyed without prejudice to his rights (Mortgage Law, Art. 71).

It, therefore, appears that the Mortgage Law provides in case of foreclosure:—

(1) For a careful examination by the court of the documents and evidence showing that the mortgagee is entitled to foreclosure; and further, that the mortgagee shall be liable for any mistakes or misstatements.

(2) That an order be served on the mortgagor requesting him to make payment.

(3) For summary sale of the property if payment is not made unless proceedings charging forgery are instituted or a third person claims title or the registry shows payment of the mortgage.

(4) That any other claims may be set up by the mortgagor in a declaratory suit and the proceeds of sale retained until the determination of such suit.

(5) That a cautionary notice may be entered in the registry by the mortgagor if he brings such a collateral declaratory suit claiming any rights in the property, in which case the property shall be sold only subject to his rights as finally determined.

## PURPOSE OF THE MORTGAGE LAW OF 1893.

The Mortgage Law of 1893 was promulgated for and especially designed to meet the needs of Cuba, Porto Rico, and the Philippines. These were agricultural countries, devoted principally to the raising of sugar, coffee, and tobacco. A large part of the value of plantations on which such products are raised consists in the growing crops and a continued state of cultivation. If a mortgagor of such a plantation who was in default could stay foreclosure proceedings by setting up any defence which he chose, and during the pendency of such proceedings take off his crops, fail to replant, and let his plantation go to waste, the security of the mortgage would be in large part destroyed. The summary procedure of the Mortgage Law was devised to obviate any such possibility, and so to benefit mortgagors by enabling them more readily to borrow money for the reason that they could, under its provisions, give better security; and to benefit mortgagees by enabling them to realize properly on their security.

The letter of the Colonial Minister to the Cortes, accompanying the Mortgage Law of 1893 (War Department Translation), says:—

> "But where the voice of experience has been heard with the greatest clamor against the law, demanding immediate relief, is where it refers to the procedure for making mortgage debts effective. . . . To furnish land with the capital it needs, and to give the lender assurances of speedy and easy recovery of his loans, is the object of the most important reform proposed by the Government. . . ."

## THE MORTGAGE LAW OF 1893 CONTINUED IN FORCE AFTER THE ACQUISITION OF PORTO RICO BY THE UNITED STATES.

The Mortgage Law of 1893 clearly continued in force after the acquisition of Porto Rico by the United States, unless it violated provisions of the Constitution of the United States applicable to Porto Rico.

Laws remain in force until they are changed by some competent legislative authority. They are not changed by a mere change of sovereignty,

> *Commonwealth* v. *Chapman*, 13 Met. 68,

nor are they changed by conquest,

> Lord Mansfield in *Campbell* v. *Hall*, Cowper, 204.

Furthermore, the so-called Foraker Act, approved April 12, 1900, provided:—

> "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect. . . ."
>
> 31 U. S. Statutes at Large, 79.

The Foraker Act, however, was not necessary to continue such laws in force, and, as said by Chief Justice Shaw in *Commonwealth* v. *Chapman*, supra, at p. 72 of a similar provision in the Constitution of Massachusetts,—

> ". . . It was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one."

## APPELLANT'S CONTENTION.

The appellant apparently contends that the provisions of the Mortgage Law, permitting the court, after an examination of the mortgagee's documents and petition, to order a sale of the mortgaged premises unless the mortgagee pays the amount due or presents a document showing a cancellation of the mortgage or unless criminal proceedings for forgery are instituted, deprive the mortgagee of his property without due process of law, in spite of the fact that the mortgagee can still present all his defences in a declaratory suit, and in a proper case can have the proceeds of sale retained until final judgment, and can ask the court to order recorded a cautionary notice of his claim to the property and thus protect his rights in the property itself. Possibly he may further contend that, as such cautionary notice may be filed only by order of the court, the Mortgage Law does not sufficiently protect him in regard to his claim to this specific property, but might, if the court should refuse to order such cautionary notice recorded, compel him to look to the proceeds of sale.

We submit that the appellant by executing his mortgage when the Mortgage Law was in force agreed to its terms, and, therefore, cannot question the sale as lacking in due process. We further submit that the Mortgage Law fully complies with all the requirements of due process of law, even though we disregard the right of the mortgagor to have a cautionary notice recorded; and furthermore, that, as a law of Porto Rico, which continued after the acquisition of the island as a part of the established local law, it is in any event unobjectionable.

## THE LAW WAS IN FORCE WHEN APPELLANT EXECUTED HIS MORTGAGE, AND BY SUCH EXECUTION HE AGREED TO SUBMIT TO THE REMEDY PROVIDED BY THE MORTGAGE LAW; AND, THEREFORE, A SALE UNDER ITS PROVISIONS RAISES NO QUESTION OF DUE PROCESS.

The appellant executed the mortgage in question in 1901 (Record, p. 70). The Mortgage Law had then been in existence for nine years. The appellant, therefore, by executing the mortgage and by inserting no provision that the remedy for enforcement provided in the Mortgage Law should not be applicable, agreed to the provisions of the Mortgage Law to the same extent as though they had been expressly incorporated in the mortgage contract.

*Edwards* v. *Kearzey*, 96 U. S. 595.
*Walker* v. *Whitehead*, 16 Wall. 314.

In *Edwards* v. *Kearzey*, supra, at p. 601, this court said:—

> "It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *This rule embraces alike those which affect its validity, construction, discharge and enforcement.*" (Italics ours.)

If the appellant must be taken to have agreed that the remedy provided by the Mortgage Law might be applied, its application could not be held to deprive him of his property without due process of law; for the con-

stitutional guaranty of due process has never been held to prevent the owner of property from making any agreement he wishes as to its disposition.

In *Jones* v. *Great Southern Fireproof Hotel Co.*, 86 Fed. 370, a lien law giving a sub-contractor who had no direct contract with the owner of the land a lien for materials was held constitutional. Its constitutionality was questioned not under the Federal Constitution, it is true, but under the Constitution of Ohio. But, as Judge Lurton (now Mr. Justice Lurton) pointed out (p. 376):—

> "The 'rights' supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government, and like declarations are to be found in all or most of our state constitutions. The question is, therefore, one of general law, having as much reference to the constitution of any other state as to that of Ohio."

Referring to the contention that the enforcement of such a lien might impair the obligation of a contract or be lacking in due process of law, Judge Lurton said (pp. 387–388):—

> "If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' *Edwards* v. *Kearzey*, 96 U. S. 595; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Smith* v. *Parsons*, 1 Ohio, 236; *Weil* v. *State*, 46 Ohio St. 450, 21 N. E. 643. Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property

> to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. *Provident Institution for Savings* v. *Jersey City*, 113 U. S. 506–514, 5 Sup. Ct. 612."

The judgment of the court was affirmed and the reasoning of Judge Lurton expressly approved by this court in *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532.

In *Provident Institution* v. *Jersey City*, 113 U. S. 506, the law provided that charges for water rates should constitute a lien superior to the lien of any mortgages. This was held due process of law with respect to a mortgage executed after the law went into effect, regardless of whether such rates ranked as taxes.

The court said (p. 515):—

> "When the complainant took its mortgages, it knew what the law was: it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction."

In *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, this court, in holding constitutional a law of Missouri which provided that in any suit on a fire insurance policy where a total loss had occurred the measure of damages should

be the amount for which the property was insured, said (p. 566):

> "It is one thing to attribute effect to the convention of parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty."

See also *Beall* v. *New Mexico*, 16 Wall. 535.

Under these decisions it is clear that a sale of the mortgaged premises under the Mortgage Law of Porto Rico could not deprive a mortgagor, who voluntarily executed his mortgage with this law in force, of his property without due process of law. The only possible question open to such a mortgagor would be whether such a law as applied to future mortgages would improperly restrict the liberty of contract.

The Mortgage Law, as has been stated above, was devised for the benefit of both mortgagors and mortgagees; it was adapted to facilitate loans; it has been in existence with apparent satisfaction to those subject to it for a number of years, as is shown by the fact that, although the legislature of Porto Rico has had authority to amend it ever since the passage of the Foraker Act in 1901, its terms have not been changed so far as the particular provisions in question are concerned. All of which considerations are persuasive as to the innate reasonableness of its restrictions.

Restrictions such as the present upon contracts creating liens upon real estate are fully justified, and will find many analogies in the legislation of our states. It is recognized that states have great latitude in regulation of such matters.

In *Otis* v. *Parker*, 187 U. S. 606, a provision in the Constitution of California that all sales on margin or for delivery at a future day should be void was held constitutional.

In *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, a law requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages was held constitutional.

Nearly all our states require the recording of deeds and mortgages to give them validity against third persons, and many of our states restrict the right of interest on loans, prohibit assignments of wages, regulate the foreclosure of mortgages and pledges, and grant liens on land to sub-contractors who have no direct contract with the owner of the land.

The question whether mortgage contracts can be regulated as they are by the Mortgage Law is, then, not open to the appellant in this case, as he contracted under the Mortgage Law, and did not attempt to provide that it should not be applicable. Therefore, under the authorities cited in this section, he must be deemed to have accepted its provisions as fully as if he had consented to its incorporation in the original mortgage contract.

## APART FROM THE FACT THAT THE APPELLANT ASSENTED TO THE PROVISIONS OF THE MORTGAGE LAW, IT FULFILLED ALL THE REQUIREMENTS OF DUE PROCESS.

Due process of law is that kind of procedure which is suitable and proper to the nature of a case and is sanctioned by the established customs and usages of the courts.

*Ex parte Wall*, 107 U. S. 265.

Ordinarily, due process requires that a man's property shall not be taken from him without notice and an opportunity to defend. It does not, however, require any particular form of procedure.

*Louisville & Nashville R.R. Co.* v. *Schmidt*, 177 U. S. 230.

And due process does not even require notice and an opportunity to defend, if custom or the nature of the case do not demand it.

*Murray* v. *Hoboken Co.*, 18 How. 272.

In the present case there is no question but that the Mortgage Law required proper notice to be given the mortgagor. There is also no question but that the mortgagor was given full opportunity to offer any defences he wished by filing a declaratory suit. The mere fact that a sale of the mortgaged premises might take place if the court were satisfied by the mortgagee's petition that he had a proper case, and if the defendant

could present no document showing a cancellation of the mortgage, did not constitute lack of due process. If the mortgagee had a defence other than the fact that the mortgage had been cancelled, he could have the proceeds of the sale of the property retained, he could recover them if he finally succeeded in his declaratory suit, and he could have a cautionary notice of his claim recorded and thus protect his interest in the property. Even if the court refused to order such a cautionary notice to be recorded, his right to be heard and to recover the proceeds of the sale of the property and to maintain his claim for damages against the mortgagee, if the mortgagee made any misstatements of fact, would afford him sufficient protection to constitute due process.

The equity practice recognized in this country may produce a not dissimilar result. A mortgagee, or, in a proper case, a creditor, may have a receiver of the debtor's property appointed and the property thus taken out of the debtor's hands, where the property is likely to be wasted or deteriorated, and it would be within the authority of the court to order such property sold by the receiver before the final determination of the litigation if the circumstances justified it.

We do not understand that the appellant denies that under the Mortgage Law a mortgagor has the right to make any defence he chooses in a declaratory suit or in a separate suit and to ask that his interest in the specific property or in the proceeds of the property be protected. *He cannot make this contention, for in the present suit he has set up not only every defence he can invent to show that Lothrop had no right to foreclose, but also all irregularities which he claims were committed in the course of the foreclosure proceedings, and he has asked that the*

*mortgaged premises be reconveyed to him because of these defences and irregularities. The court has not refused to hear these contentions, on the ground that the Mortgage Law provides for an absolute sale of the property, whether or not they exist.* It has heard all his proofs and contentions, and decided that they are without merit, or that he has failed to prove them, or that he has waived his rights.

## EVEN IF THE MORTGAGE LAW OF PORTO RICO WOULD BE UNCONSTITUTIONAL IF ADOPTED BY A STATE, THE CONSTITUTION OF THE UNITED STATES DID NOT PREVENT THE CONTINUANCE IN FORCE OF THIS LAW IN PORTO RICO.

A majority of the court in *Downes* v. *Bidwell*, 182 U. S. 244, expressed the opinion that the Constitution might and did apply to Porto Rico in certain fundamentals. Admitting this to be so, the Mortgage Law of Porto Rico, which was in force at the time the United States acquired Porto Rico, did not so violate any fundamental right as to require this court to hold that it was repealed by the mere acquisition of Porto Rico and the simultaneous application of the Constitution of the United States to that island.

Even if such procedure would not constitute due process of law in one of the states of the United States which recognizes the established usages and customs in force in this country at the date of the original adoption of the Constitution, it is respectfully submitted that it would, nevertheless, constitute due process of law in Porto Rico. The question of what constitutes due process of

law is largely an historical one, and narrows down to the question of what was the law of the land when the Constitution became applicable. As applied to Porto Rico, established customs and usages not completely subversive of justice may well be held due process, even if they would not be so held if adopted in one of our states. It is unquestioned that the present Mortgage Law was in force at the time when the United States acquired Porto Rico, and that it was deemed adapted to the needs of the people, and not oppressive or in violation of any fundamental rights. It should, therefore, clearly be deemed due process.

There can be no doubt that Congress did not believe that this law had been repealed or intend that it should be, or it would have been its duty at once to provide a new law covering the subject.

In *Downes* v. *Bidwell*, supra, at p. 287, Mr. Justice Brown said:—

> "If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately, our own theories may be carried out, and the blessings of a free Government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action."

In *Hawaii* v. *Mankichi*, 190 U. S. 197, it was held that, in spite of the Newlands Resolution annexing Hawaii, which provided that the municipal legislation of Hawaii not "contrary to the Constitution of the

United States" should remain in force, the procedure in criminal cases provided for by the Fifth and Sixth Amendments to the Constitution was not essential in Hawaii. Mr. Justice Brown, after saying that Congress doubtless did not intend to abolish the existing criminal procedure in Hawaii, said (pp. 217–218):—

> "We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being."

In the present case we submit that Congress did not intend that the Mortgage Law should be abolished and the Constitution of the United States did not require it.

It is perhaps not necessary to point out the serious consequences which would result if the Mortgage Law were now held unconstitutional. All titles acquired in foreclosure proceedings for the past thirteen years would be upset, present mortgagees would be unable to foreclose, and it would be difficult to predict the confusion and loss to individuals. The length of time during which the Mortgage Law has been generally accepted, and the extent of the rights which have become vested in reliance on it, are of themselves strong arguments in favor of its constitutionality, for they constitute in substance a decision by those best qualified to decide that the Mortgage Law was and is the "law of the land" so far as Porto Rico is concerned.

1 (*c*).

## THE APPELLANT IS ESTOPPED TO OBJECT TO THE CONSTITUTIONALITY OF THE MORTGAGE LAW.

The appellant sold the property in question to one Alvarado on the day foreclosure proceedings were instituted. Alvarado later, while holder of title appeared in court and consented that his ownership be cancelled (Record, pp. 74–75). He and his principal or privy, the appellant, are, therefore, estopped from objecting to the constitutionality of the law under which the proceedings to which Alvarado consented took place.

It has been pointed out in an earlier part of this brief (*ante*, pp. 18–22) that the consent of the appellant to the provisions of the Mortgage Law would be implied from the fact that the Mortgage Law was in force at the time that he executed his mortgage in favor of Lothrop. Alvarado's subsequent concurrence in the proceedings was expressly a ratification of them. When subsequent ratification of a proceeding is joined with prior consent to it, and when the other party has acted in reliance on the validity of that proceeding, will the consenting party be heard in disaffirmance of it?

2 (*a*).

## ALL THE ESSENTIAL REQUIREMENTS OF THE MORTGAGE LAW WERE OBSERVED IN THE FORECLOSURE PROCEEDINGS.

Neither a mortgage foreclosure sale nor a judicial sale of any sort will be set aside for immaterial irregularities or omissions where the complainant's rights have not been prejudiced.

Section 142 of the Code of Civil Procedure of Porto Rico contains a statutory declaration of this principle which covers the judicial sale held in the present foreclosure proceedings:—

> "The court must, in every state of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

In *Stockmeyer* v. *Tobin*, 139 U. S. 176, this court refused to set aside a judicial sale held in the State of Louisiana, and used the following language (pp. 196–197):—

> "Under such circumstances, it not appearing that any real injury has been done to the plaintiff, the sale should not be disturbed because of omissions or informalities that did not affect the substantial rights of the party complaining. In *Copeland* v. *Labatut*, 6 La. Ann. 61, the court said: 'The petition contains no allegation and the record no proof of any injury having been sustained by the plaintiff, in consequence of the informalities alleged; and no offer on the part of the plaintiff to warrant that

> the property, if resold, would bring a higher price than it did before. Under the rule which we have found it necessary to adopt, those omissions would prevent us from disturbing the judgment, even if the informalities were much more material than they actually are.' So, also, in *Mullen* v. *Harding*, 12 La. Ann. 271–2: 'Unless the plaintiffs can show that they have suffered injury by the informalities complained of, they ought not to be permitted to attack the validity of the proceedings.'"

See also *Nalle* v. *Young*, 160 U. S. 624.

## CONTENTION THAT THERE WAS NO JURISDICTION OVER THE DEFENDANT TORRES ZAYAS IN THE FORECLOSURE PROCEEDINGS.

The appellant, Torres Zayas, contends that the District Court of Porto Rico did not acquire jurisdiction over him, as he was not properly summoned in the mortgage foreclosure proceedings.

In mortgage foreclosure proceedings under the Mortgage Law the mortgagor first presents his petition to the court. The court, if satisfied with the correctness of the petition and the documents accompanying the same, issues a decree or order summoning the owner of the mortgaged property to pay, and stating that otherwise a public sale of the mortgaged premises will be held (Art. 170, General Regulations for the Execution of the Mortgage Law, War Department Translation, 1899). Provision is also made in special cases as to the persons on whom such summons should be served (Art. 171, General Regulations for the Execution of the Mortgage Law). This summons constitutes service on the defendant in mortgage foreclosure proceedings. The order of the

court providing for the requirement of payment recites the fundamental facts, and this order is communicated to the defendant when the requirement is made.

The findings of fact show that such summons was served on the defendant, Torres Zayas (Record, p. 72). The requirement of payment was a proper summons, and fully complied with the law. It was not necessary to serve him with any other citation or any copy of the complaint.

The old Code of Civil Procedure, in force at the time these foreclosure proceedings were brought, provided as follows (Art. 275):—

> "ARTICLE 275: The requirements will be effected by communicating to the party upon whom the demand is made, in the form provided, the decree in which said demand is ordered, the clerk expressing in the corresponding document that the requirement (demand) ordered in said decree, has been made upon the party."

To this objection of the appellant's the Supreme Court of Porto Rico said (Record, p. 54):—

> "The proceeding had been begun before the Code of Civil Procedure went into effect, and there is nothing to show that the citation (requirimiento) was not in the due form required by the Mortgage Law."

But even if the summons had not been properly served, the appearance of Alvarado, the assignee of Torres Zayas, in the foreclosure proceedings and his consent on September 29, 1905, that his title should be cancelled of record, gave the court full jurisdiction (Record, p. 74).

Alvarado at this time was the proper person to be represented in the proceedings, since he was the holder of

the record title. The last paragraph of Article 175 of the General Regulations for the Execution of the Mortgage Law provides as follows:—

> "If, during the course of the proceedings the estate or some of the mortgaged estates pass into the hands of another owner, the latter, proving the record of his title, may demand that the decrees filed in the clerk's office be presented to him, and the judge shall consent thereto without stopping the course of the proceedings, subsequent proceedings being addressed to him as subrogated to the principal."

## CONTENTION THAT THE MORTGAGE NOTES WERE NOT PROPERLY PRESENTED.

The appellant contends that the mortgage notes were not presented to the court with the petition for foreclosure. They were presented in the present suit cancelled (Record, pp. 71, 54).

Paragraph Second of Article 169 of the General Regulations for the Execution of the Mortgage Law requires that there be presented with the first document in the proceedings the instrument or instruments of the credit. This requirement was satisfied by presenting the mortgage contract itself without the notes (Record, p. 72).

Furthermore, Lothrop, in any event, held the mortgage in trust for the note holders (Record, p. 71). In such a case the holders of such notes are not necessary parties to a suit to foreclose the mortgage, and it would, therefore, clearly not be essential to present their notes in order to foreclose.

*Cintron* v. *Banco Territorial*, 9 P. R. 220.

As to this alleged omission, the Supreme Court of Porto Rico in its opinion said (Record, p. 54):

> "There does not appear to be anything in the Mortgage Law which requires the notes to be presented at the beginning of the mortgage proceeding. DeFord & Co. were acting as trustee for the holders of the notes and the said notes were returned to them. There was no danger of the defendants being sued by other persons because in the present suit the notes were delivered up cancelled. . . . It does not appear, furthermore, that the notes were not in the hands of DeFord & Co. when the proceeding was initiated."

It may further be added that, if the Mortgage Law does provide for the presentation of the notes themselves, it is only to satisfy the court that the order of payment should issue as provided in Article 170 of the General Regulations for the Execution of the Mortgage Law. If the court is satisfied by the papers presented, the requirements of the Mortgage Law are fulfilled.

Furthermore, if presentation of the notes is required, an omission to do so, when it appears that the notes have since been cancelled, cannot have injured the mortgagee and clearly would not justify holding the proceedings invalid.

## CONTENTION THAT NO REQUIREMENT FOR PAYMENT WAS MADE UPON THE WIFE OF THE APPELLANT.

It is alleged as an irregularity that no requirement for payment was made upon the wife of Torres Zayas. As was pointed out in the opinion of the Supreme Court of Porto Rico (Record, p. 54), a wife is not a necessary

party to a suit concerning the conjugal property, the husband being the administrator thereof,—Sections 161 and 1327 of the Civil Code being cited in support of this proposition.

In *Porto Rican Leaf Tobacco Co.* v. *Ereno*, 16 P. R. 96, it was held that the wife is not a necessary party to a suit to foreclose a mortgage of conjugal property, since the husband is the legal representative of the conjugal partnership.

A further answer to this objection is that the appellant's wife is not a complainant in the present proceeding. He alone brings this suit, and he was a party to the foreclosure proceedings, so that he cannot complain.

## CONTENTION THAT TWO OF THE ORDERS IN THE FORECLOSURE PROCEEDING WERE SIGNED ONLY BY TWO JUDGES.

An order requiring the debtor to pay, in accordance with Article 170 of the General Regulations for the Execution of the Mortgage Law, was made on May 3, 1904.

The court at this time consisted of three judges, and the order was signed by two of the regular judges and by one H. S. Belaval.

On June 16, 1904, the sale at public auction was ordered signed by two judges.

General Orders, 1899, No. 118, permit the appointment of a substitute judge; and, as the secretary certified that the order of May 3, 1904, was signed by three judges, it is apparent that Belaval was a substitute judge. It certainly does not appear to the contrary (see Opinion of Supreme Court of Porto Rico, Record, p. 55).

The order of June 16, 1904, was a mere formal order following the failure of the appellant to pay in accordance with the preceding order. Even if signed only by the instructing judge, it would have been valid.

The appellant contends that, as three judges constituted the court, all three must take part in any trial or vote. Even if we conceded this to be true (which we do not), it does not follow that all three must sign every order. It does not appear in the present case that all three judges did not sit to decide upon each of the orders. The findings of fact merely recite how the orders were signed. It would clearly be sufficient for a majority of the judges to sign an order which all of the judges voted or determined upon.

After July 1, 1904, the court of three judges was abolished, and the court was composed of a single judge, so that the above contention cannot apply to any orders made after that date.

## CONTENTION THAT NOTICE OF SALE DID NOT CONTAIN THE VALUATION GIVEN THE PROPERTY.

The fact that the published notice of the sale did not contain the valuation of the property cannot have injured the appellant. The Mortgage Law provides that at the mortgage sale not less than two-thirds of this valuation shall be accepted. In the present case the plantation was valued at $40,000, and it was sold for an amount far in excess of two-thirds of this value; in fact, for an amount in excess of the total valuation, for the price included the mortgage debt of $37,000, interest due and to become due, and a cash payment of $500, plus the costs of the proceedings.

## CONTENTION THAT THERE WAS ONLY ONE PUBLIC SALE, AND THAT THE SALE TOOK PLACE WITHIN EIGHTEEN DAYS.

These objections were not assigned as errors to the judgment of the Supreme Court.

Only one sale was required, as the property brought more than two-thirds of its valuation (General Regulations for the Execution of the Mortgage Law, Art. 172).

The findings of fact do not show that the sale took place within eighteen days, and the Supreme Court of Porto Rico held that the proper time, namely, twenty days from the giving of the notices, had elapsed at the time the sale occurred (Record, p. 55).

2 (*b*).

## ALL IRREGULARITIES OR OMISSIONS, IF ANY, IN THE COURSE OF THE MORTGAGE PROCEEDINGS, AND ALL OTHER OBJECTIONS TO THE SALE OF THE MORTGAGED PREMISES, WERE WAIVED BY THE APPELLANT'S ASSIGNEE, ALVARADO.

As has been stated, the appellant, on the very day foreclosure proceedings were instituted by Lothrop, viz., April 25, 1904, transferred title to the mortgaged premises to one Alvarado (Record, p. 73). Alvarado on June 3, 1904, brought suit in the District Court of Ponce against Lothrop, praying for a declaration of nullity of the foreclosure proceedings; and he also moved that

the auction sale be stayed. On August 5, 1904, the court entered the following order in this proceeding, viz.:—

> "The court orders the dismissal of this case because it has been twice set for hearing and counsel has failed to appear to-day" (Record, p. 75).

On September 5, 1905, an order was made by the court in the foreclosure proceedings whereby Alvarado was summoned to make payment of the price of the sale of the mortgaged premises, being warned that, if he failed so to do, a writ would issue to the Registrar of Property for the cancellation of his registration of ownership in said property. Thereupon Alvarado made the following statement in court (Record, pp. 74-75):—

> "In the District Court for the Judicial District of Ponce, P. R.—To the Hon. José Tous Soto,—Now comes before Your Honor Alejandro Alvarado, of age and a resident of Juana Diaz and states: that under date of the 16th of September, a requirement was made to him by order of this Court, to pay over to Don Pedro Juan Rosaly, within the following ten days, the sum which the latter had in his turn paid for the property Semil, at the auction sale of said property which was had by virtue of a foreclosure proceeding instituted by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres y Zayas, the said Alvarado having been warned that in case he should fail so to do a writ should be issued to the Registrar of Property for the cancellation of the registration of ownership made therein in his favor in regard to said property and to appear before the Court within that time, having previously notified Mr. Rosaly, to show sufficient reasons why he should be excused from obeying the said order. That although he notified within that time, by his counsel Mr. Llorens Torres, an opposition to the petition of Mr. Rosaly, he

abandoned the same later on by failing to appear before the court to sustain the same at the date set for the hearing thereof. *And that as he desires to make known in a clear manner his acquiescence in the motion of the petitioner, he now appears and states: that being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him, that the registration of ownership which he, Alvarado, had upon the said property should be cancelled.* Ponce, September 29th, 1905.—(Signed) Alejandro Alvarado.—Sworn to before me this 29th day of September, 1905.—W. V. Robbins, United States Commissioner." (Italics ours.)

On April 25, 1907, Alvarado and the appellant rescinded the deed of sale to Alvarado by a public document. The appellant testified in the present suit that the sale to Alvarado was simulated.

It is evident that on September 29, 1905, Alvarado was the record owner of the property, and entitled, so far as third persons were concerned, to deal with the property as owner. It is expressly provided in Article 175 of the General Regulations for the Execution of the Mortgage Law that a purchaser of mortgaged premises during foreclosure proceedings shall be entitled to be treated as subrogated to the rights of the mortgagor in such proceedings.

If, as the appellant now contends, this sale was simulated, Lothrop did not know of such fact, and was entitled to treat Alvarado as the true owner authorized to deal with and dispose of the property. Moreover, if the sale was simulated, it must have been undertaken for the purpose of hindering and delaying the foreclosure proceedings, and such an attempt should never be aided by a court in any way. Finally, as Alvarado brought

suit to cancel such proceedings in June, 1904, he was clearly authorized by the appellant to represent him with reference to the property, and must therefore, in any event, be treated as the authorized agent of the appellant.

Alvarado, then, being authorized, so far as Lothrop and Rosaly were concerned, to deal with the mortgaged premises as owner, expressly appeared in the foreclosure proceedings, withdrew his dissent to the petition that his ownership of the property be cancelled, and joined in the petition that such ownership be cancelled. His ownership was thereupon cancelled, the deed of the property to Rosaly was executed and possession was taken thereunder, the original mortgage notes were paid, and the original mortgage cancelled of record.

By this conduct Alvarado waived all claims that the foreclosure proceedings were irregular and all other objections he may have had to such proceedings. Upon his own petition his title was cancelled, so that the foreclosure proceedings could be consummated by the giving of a good deed to the property. He is estopped now to deny that the proceedings consummated as the result of his request were invalid, especially as it is not contended that he was ignorant at the time he requested such action of the irregularities he now attempts to set up. If Alvarado is estopped, his principal and privy in title, the appellant, must be equally estopped.

The appellant contends that Alvarado's assent was forced, as Alvarado did not have the money to pay the price for which the land sold. This is not the fact. If the mortgage proceedings were irregular, Alvarado could have set this up, as he at first actually did, as a reason why he should neither pay the price of the sale

of the mortgaged property nor have his title cancelled of record. He could, in the alternative, have failed to appear. By appearing and actively requesting that the petition be granted, he waived his objections to the foreclosure proceedings which had already taken place; and he and his privy, the appellant, are certainly estopped after two years to contend that such proceedings were void.

In *Halliday* v. *Stuart*, 151 U. S. 229, certain land, pending appeal, was sold under order of the court with the consent of the attorneys for the parties. This sale was later set aside by the court without notice to the purchaser, and the land was again sold. This court said (p. 238):—

> "When appellees present a decree of sale under which they purchased the lands, and, in virtue of that decree and the sale had under it, claim the lands, Halliday may well say, 'Whatever may be the rights of Craig's estate in respect to the lands, and whatever may be your right to the proceeds of the sale at which I purchased, you cannot claim the lands, purchased by me under a former decree, which sale occurred with your consent, and which purchase was confirmed and a deed made to me without objection from you.' And this position is consistent with the principles of equity."

3.

## INTEREST DUE ON THE MORTGAGE IN 1904 WAS NOT PAID, AND THE APPELLEES WERE ENTITLED TO SHOW THIS FACT.

The mortgage contract provided in clause 9th that all the proceeds of the mortgaged premises should be delivered to Messrs. De Ford & Company, to be sold by them, they to deduct from the proceeds the amount of the interest to be paid annually to the creditors (Record, pp. 70, 71). It was later arranged by an oral agreement that from the value of the products the appellant's current expenses should be paid before the payment of interest (Record, pp. 71, 56). In 1904 the value of the coffee delivered to Messrs. De Ford & Company exceeded the interest due that year, but, in accordance with the agreement with the appellant, the latter drew on the proceeds to meet the current expenses and did not leave sufficient funds to pay the interest for the year 1904 (Record, pp. 71, 72, 56). Accounts of the receipts from the plantation were rendered each month by De Ford & Company to the appellant and also accounts of his debits and credits, and the appellant never questioned the correctness of these accounts (Record, pp. 71, 56).

The appellant contends that, as a statute somewhat similar to our Statute of Frauds exists in Porto Rico, the clause of the original mortgage contract providing that the proceeds of each crop must first be applied to the payment of interest could be changed only by a new

contract in writing embodied in a public instrument. He, therefore, contends that, although the proceeds of the crop of 1904 were not, as a matter of fact, applied to payment of interest, but were applied at his request to other purposes, the agreement under which they were so applied to other purposes was unenforceable; and it must therefore be held that such proceeds were applied to payment of interest, or in any event that the appellees are not entitled to show that they were not so applied.

*(a)*

## APPELLEES HAVE NOT ATTEMPTED TO ENFORCE THE ORAL CONTRACT.

The appellant's whole argument rests on the contention that the oral agreement that the proceeds of the crop should be applied to current expenses, and not to payment of interest, was unenforceable. An obvious answer to this argument is that the appellees have not attempted to enforce the oral agreement, and that it is immaterial whether or not it was enforceable.

The appellees relied on the original mortgage contract, and showed that the mortgage was properly foreclosed, because interest was not paid when due. In answer to this the appellant did not contend that interest had actually been paid. He argued that there was a contract which provided that De Ford & Company (who were not even parties to the mortgage contract) should retain and apply to payment of interest the proceeds of the crop of each year; that what De Ford & Company ought to have done must be deemed to have been

done; and that, therefore, the interest must be deemed to have been paid. As the question at issue was whether or not interest had been paid to the mortgagee or noteholders, and not what De Ford & Company ought to have done, the appellees might well have made no reply to this contention. But they did reply to this contention by showing that De Ford & Company did not retain and apply such proceeds to payment of interest because the appellant himself requested the right to use these funds for his current expenses, and that he did so use them. To show his request they offered proof of the oral agreement which embodied his request, and they also showed that in accordance with such agreement he actually obtained the use of these funds. They thus showed conclusively that the appellant, having himself requested that the proceeds of the crop be diverted to other purposes and having used them for such purposes, could not contend that the proceeds should be deemed to have been used for payment of interest.

The purpose, then, of proving the oral agreement was to show the plaintiff's request to De Ford & Company, and his use of the proceeds of the crop in pursuance of such request. Not only did the appellees not attempt to enforce such oral agreement, but it was immaterial whether it constituted an agreement of any kind, whether enforceable or not. Being merely offered in proof to show the plaintiff's request as to the use of the funds, the question of whether or not it constituted an enforceable agreement was clearly immaterial.

The fact that De Ford & Company might have refused to permit Zayas to use the proceeds of the 1904 crop for other purposes does not entitle him to claim that such proceeds must be deemed to have been applied to pay-

ment of interest. If a sales agent who has a contract under which he may retain proceeds of sales to pay his advances at his principal's request waives his right to retain a portion of such proceeds and pays them over to his principal, his principal cannot contend that the agent must be held to have been paid to the extent of the proceeds so turned over to the principal. Nor would the agent thereafter be precluded from enforcing his claim for any unpaid advances by foreclosure of any lien held by him or otherwise. The present case is on all fours with the above-mentioned example.

If the mortgage contract had provided that Zayas himself should apply the proceeds of the crop to payment of interest and he had not in fact done so, even though with the consent of the appellees, it would be clear that he could not contend that interest had been paid. It is difficult to see how he has any better standing to claim that interest was paid because De Ford & Company at one time had sufficient funds to pay this interest, but, instead of retaining such funds and applying them to payment of interest, paid them over to the appellant at his request.

It should be borne in mind that the notes were negotiable, and it appears that they were not owned by De Ford & Company at the time interest became due. Furthermore, Lothrop was the mortgagee, not De Ford & Company. The latter were not parties to the mortgage contract. If interest was not paid on the mortgage notes at Zayas's request (and he surely cannot contend that interest was paid), he cannot contend that, because De Ford & Company could have kept the proceeds in their hands and applied such proceeds to payment of interest, such interest must be deemed to have

been paid so as to deprive the mortgagee and the holders of the mortgage notes of their right to foreclose.

As we have above stated, the question at issue was whether or not the mortgage interest had been paid, and it is clear it had not been paid. The absurdity of the appellant's contention that it must be *deemed to have been paid* is self-evident. Is it possible that, when the mortgagee in 1904 demanded his interest, the appellant could have properly replied, "While as a matter of fact you have not received your interest, yet you must be deemed to have received it, because, if you had not let me at my request apply the proceeds of the crop to my current expenses, you would doubtless have been paid"?

(*b*)

## IN ANY EVENT THE APPELLEES WERE ENTITLED TO PROVE THE ORAL AGREEMENT.

Even if this court should hold that the appellees must rely not as they contend on the fact that interest was not paid and that it was not paid because of the conduct of the appellant, shown by his oral agreement, but on the oral agreement itself, they are entitled to do so.

The appellant must object to proof of the oral agreement upon one of two grounds,—(1) either that it was in violation of the parol evidence rule, or (2) that it violated the Statute of Frauds.

It is clear that the parol evidence rule was not violated by the admission of this proof. It was not the purpose of this evidence to vary the terms of the original mortgage contract in any way. The appellants admitted the

existence of the mortgage contract, but then proved that one of its terms had been abrogated by a subsequent agreement. The parol evidence rule does not forbid such proof.

*Knickerbocker Life Ins. Co.* v. *Norton*, 96 U. S. 234.
*Grandin* v. *U. S.*, 22 Wall. 496.
*R.R. Co.* v. *Trimble*, 10 Well. 367.
*Teal* v. *Bilby*, 123 U. S. 572.

Nor has the objection any greater force, if based upon the Statute of Frauds. Zayas himself caused the proceeds of the 1904 crop to be applied in accordance with the terms of his oral agreement, to purposes other than the payment of interest. Such subsequent oral contract, therefore, was fully performed with his concurrence and knowledge. It is settled that, when an oral contract which is unenforceable by reason of the Statute of Frauds has been fully performed, the rights of the parties are no longer affected by the statute, and it is immaterial that either party might have refused to perform.

*Dibb* v. *Allen*, 149 U. S. 481.
*Reedy* v. *Smith*, 42 Cal. 245.
*McLure* v. *Keen*, 25 Colo. 284.
*Stone* v. *Dennison*, 13 Pick. 1.

(c)

**THE APPELLANT IS ESTOPPED TO CONTEND THAT THE PROCEEDS OF THE 1904 CROP OUGHT TO HAVE BEEN APPLIED TO PAYMENT OF THE INTEREST ON THE MORTGAGE DEBT, SINCE THE APPLICATION OF SUCH PROCEEDS TO OTHER PURPOSES WAS MADE AT HIS REQUEST AND FOR HIS BENEFIT.**

It is evident from the facts found that the appellant required additional funds to cultivate and gather the crop from his plantation. If he had not been able to cultivate it he would have certainly been unable to pay the mortgage interest, and foreclosure would have resulted. At his request and for his benefit it was agreed that the proceeds of the crop, instead of being applied to payment of interest, might be used by the appellant for payment of such current expenses. This was done, and the appellant reaped the benefit of the arrangement.

Furthermore, accounts showing such application were rendered monthly to Zayas, and he never questioned the correctness of such accounts until he brought this suit nearly four years later.

It is clear that the application of the proceeds of the 1904 crop to payment of current expenses was the result of the plaintiff's conduct and request and for his benefit. Under these circumstances he is now clearly estopped to contend that the proceeds should not have been so applied, and that, therefore, interest must be deemed to have been paid.

4 (*a*).

THIS COURT WILL NOT CONSIDER THE APPELLANT'S OBJECTIONS TO THE RULINGS OF THE TRIAL COURT AS TO THE ADMISSIBILITY OF EVIDENCE BECAUSE THE APPELLANT NEITHER SPECIFIES THE REASON FOR HIS OBJECTION NOR STATES WHAT HE INTENDED TO PROVE BY THE EVIDENCE CLAIMED TO HAVE BEEN WRONGFULLY REJECTED.

The manner in which the appellant in this case has attempted to bring up alleged errors of the trial court in rulings upon the evidence is open to serious objections. Throughout the assignment of errors upon questions of evidence it is simply stated that a witness was asked a certain question, that this question was objected to, and that the evidence was thereupon either admitted or rejected. Where the plaintiff complains of the rejection of evidence, it is nowhere stated what the rejected evidence was intended to prove nor the specific grounds upon which the question was objected to. The result of this is that the court has absolutely no basis upon which to decide whether or not the rejection of the evidence was proper. Upon appeal the assumption must be that the ruling of the trial court was correct.

In *Camden* v. *Doremus*, 3 How. 515, this court declined to consider objections to the admissibility of evidence which did not state the grounds upon which they were made and which did not point to some definite

and specific defect in the nature of the evidence admitted. It was said (p. 530):—

> "We must consider objections of this character as nugatory, and, if entitled to weight anywhere, certainly as without weight before an Appellate Court."

In *Burton* v. *Driggs*, 20 Wall. 125, the same rule was laid down. At the very outset of the opinion of the court in that case Mr. Justice Swayne said (p. 133):—

> "It is a rule of law that where a party excepts to the admission of testimony he is bound to state his objections specifically, and in a proceeding for error he is confined to the objection so taken. If he assigned no ground of exception the mere objection cannot avail him. In *Hinde's Lessee* v. *Longworth*, this court said 'As a general rule we think the party ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the Court is called to the testimony in that point of view only.' Here the objection was that the copy was not the original. This, as a fact, was self-evident; but as a ground of objection it was wholly inadequate."

In *Noonan* v. *Caledonia Mining Company*, 121 U. S. 393, Mr. Justice Field, in the course of his opinion, said (p. 400):—

> "The objection to the introduction of the articles of incorporation at the trial was that they were 'immaterial, irrelevant, and incompetent' evidence. The specific objection now urged, that they were not sufficiently authenticated to be admitted in evidence, and that the certificates were made by deputy officers, is one which the general objection does not include. Had it been taken at the trial and deemed tenable, it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates of the articles of in-

> corporation. The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it was made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. *United States* v. *McMasters*, 4 Wall. 680; *Burton* v. *Driggs*, 20 Wall. 125; *Wood* v. *Weimar*, 104 U. S. 786, 795."

To the same effect are the cases of *Toplitz* v. *Hedden*, 146 U. S. 252; *Choctaw Railway Company* v. *McDade*, 191 U. S. 64. In the last cited case the court laid down the rule as follows (p. 69):—

> "The assignments of error as to the admission of testimony were nearly all based upon exceptions general in their character and under the well-settled rule not reviewable here."

There is another equally well-settled rule of law against which the appellee's assignment of errors as to the rulings on the admissibility of evidence offends. Many of the questions objected to at the trial by the appellant were in themselves admittedly unobjectionable. If any objection could validly have been made, it would have been to the answer made to the question rather than to the question itself. The settled rule in this court is that, if at the trial objection is made to a question which is unobjectionable, inquiry cannot be made as to whether or not the answer to that question was responsive. If the answer was not responsive, the objection should have been to the answer, and not to the question.

*Gould* v. *Day*, 94 U. S. 405.

4 (*b*).

## NO REVERSIBLE ERROR WAS COMMITTED BY THE DISTRICT COURT IN THE ADMISSION OR REJECTION OF EVIDENCE.

It is not apprehended that the court in this case will find it necessary to rest its decision upon any particular ruling of the trial court on matters of evidence. There are so many broad grounds upon which the case may be and should be decided in favor of the appellees that the questions of evidence are immaterial, and it is not expected that the court will find it necessary to consider the questions of evidence involved. Consequently, no exhaustive discussion of the rulings upon the evidence is intended. Indeed, a very brief discussion of the points involved will suffice to show that the rulings of the trial court upon matters of evidence are unassailable.

The first objection of the appellant is based upon the exclusion by the trial court of certain evidence relating to the delivery of coffee during the years 1901, 1902, and 1903. The exact force of this objection it is not possible to see; and, while this may truthfully be said of all the appellee's objections, it is especially and confusingly so in respect to this first. In the first place it is not apparent just what bearing the delivery of coffee during the years 1901, 1902, and 1903 had upon the issues involved in this case. The main issue was whether or not the interest due on the 21st of February, 1904, had been paid. Evidence as to deliveries of coffee in foregoing years was not pertinent to this issue, for such

deliveries were destined for the payment of the interest of the prior years. If we are driven to assume that the evidence excluded was intended to prove that more funds had come into the hands of De Ford & Company than were accounted for, a full opportunity was given to the appellant at a subsequent time in the trial to introduce whatever evidence he desired upon this point. (Opinion of the Supreme Court of Porto Rico, Record, p. 99.) The decision of the trial court that there had been no misappropriation of the income of the years prior to 1904 was upon the ground, among others, that De Ford & Company had rendered regular accounts of the proceeds of the mortgaged property, and that these accounts had never been objected to by appellant until the institution of these proceedings.

The next objection is based upon the exclusion of certain evidence which would have shown the amount of the rents and profits from the mortgaged property from just before the time of the foreclosure sale up to date. The court rightly excluded this evidence under the well-known rule that, where the principal prayer of a suit is denied, the ancillary and auxiliary prayers will also be disallowed.

An objection was based upon the fact that the defendant was allowed to introduce evidence showing that De Ford & Company were trustees for the holders of the notes secured by the mortgage, and so entitled to collect interest thereon and to take any steps necessary to collection. This was done by having Mr. Rosaly explain certain endorsements to De Ford & Company upon the backs of these notes. It should be noted that the terms of the endorsement are perfectly clear and self-explanatory. The questioning of the witness was merely de-

signed to call attention to the terms of the endorsement. It should further be noted that it is always permissible to explain the usages or customs of a trade.

> "Evidence of usage or custom is admissible to explain the true character of an act, contract or document when it cannot be made clear in any other way; but usage is never admissible as evidence except for purposes of interpretation." *Laws of Porto Rico*, 1905, *Law of Evidence*, *Art.* 35, *Part* 10.

It is next objected that the trial court erred in admitting in evidence the books of account of De Ford & Company and of Lothrop, Luce & Company because the same were not kept in the form provided by the Code of Commerce, "inasmuch as the same is not a ledger." Here, again, is an objection which is especially open to the criticism that it leaves us without knowing what the objection is, and much less the grounds for it. Why the books of accounts admitted were not "a ledger" and wherein said books offend against the provisions of the Code of Commerce is not apparent.

The Code of Commerce provides for the keeping of books in Articles 33 to 49 (Title III., Books and Book-keeping of Commerce).

By Article 33 merchants are required to keep:—

(1) A book of inventories and balances.

(2) A day book.

(3) A ledger.

(4) A copying book for letters and telegrams.

(5) Other books required by special laws.

By Article 34 it is provided that such other books as may be considered advisable according to the system of book-keeping adopted may also be kept, and that such books shall not be subject to the provisions of Article 36.

> script or copy by virtue of which the third party has acted."

The subsequent recording of the rescission, on April 20, 1907, of the sale of Torres Zayas to Alvarado is likewise unimportant, for it took place subsequent to Alvarado's appearance in the foreclosure proceedings, and Article 25 of the Mortgage Law provides,—

> "Recorded titles shall be effectual against third parties only from the day of record."

The next assignment of error is based upon the fact that the trial court allowed the gentleman who was judge of the District Court for the judicial district of Ponce to testify that he had issued an order on the 19th of July, 1904, directing that a writ of execution be issued to the marshal to sell the mortgaged property at public auction.

This assignment of error is based upon the assumption that the order of July 19, 1904, constituted a judgment. In point of fact it was not a judgment. The sole object of that order was to resolve the hesitancy of subordinate officers of the court based upon doubts as to just what their duties were under a new law. The office of marshal had been created by the law of March 10, 1904, and that officer did not begin to exercise his functions until the 1st of July, 1904 (Law of March 10, 1904, § 33). Prior to that time the clerk was the officer upon whom the duty of carrying out the orders of the court devolved. Some doubts arose as to whether the order of sale at public auction should be carried into effect by the clerk or by the marshal: hence the order of the court directing the clerk to issue an order of execution to the marshal to carry out the previous orders of May and June. This

order of July 19 was simply an instruction providing for the fulfilment of a previous order, a specification of the manner in which an existing order should be carried out, a statement of the law by the judge for the guidance of his subordinates.

It should be noted that any judgment of the court decreeing a foreclosure could not possibly appear in the Book of Records or in the Book of Judgments, if made prior to July 1, 1904. The new Code of Civil Procedure providing for the keeping of a Book of Records and a Book of Judgments did not go into effect until July 1, 1904. Consequently, neither the order requiring payment (May 3, 1904) nor the first order providing for sale at public auction (June 16, 1904) could appear in the Book of Records or in the Book of Judgments, since said books were not in existence at the time those orders were made. As to the superfluous order of July 19, 1904, that would not appear in the Book of Judgments, because it did not have the character of a judgment: it was, as we have pointed out, simply an explanatory order to aid in the enforcement of a judgment.

It has been decided by the Supreme Court of Porto Rico (*Porto Rico Leaf Tobacco Company* v. *Aldrey*, 13 P. R. 228, at page 233) that it is the order to pay, in this case the order of May 3, 1904, rather than the order to sell, which is the final determination in the summary proceedings of the Mortgage Law. If any of the orders made in the course of the foreclosure proceedings attacked in this suit should appear in the Book of Judgments, it would, then, be the order of May 3, 1904. The Book of Judgments was not in existence on May 3, 1904.

Even if the order were to be regarded as truly a judgment, still no objection to this manner of proving it could have been made under the peculiar circumstances which existed in this case. Although some earlier decisions in a few jurisdictions were to the effect that, where the record of a judgment was lost or destroyed, the judgment could not be proved until the record had been restored by proper proceedings in the court where the judgment was rendered, the weight of authority is in favor of the proposition that, where a judgment is so lost or destroyed, secondary evidence is admissible to establish the fact of the existence of such a judgment and its contents.

*Ames* v. *Hoy*, 12 Cal. 11.
*Stockbridge* v. *West Stockbridge*, 12 Mass. 400.
*Mandeville* v. *Reynolds*, 68 N. Y. 528.

There is no reason for any distinction to be made where, as in this case, the judgment (if such it be) was omitted by mistake or inadvertence from entry in the Book of Judgments. Under the best evidence rule the course pursued in this case was certainly unobjectionable. A judgment has been rendered; no written record of it was in existence; the only persons who could testify to the existence of that judgment, with the single exception of the judge who rendered it, have died: no argument seems necessary to show that the judge in such a case can testify as to the existence of a judgment.

Furthermore, the order of execution issued by the secretary of the District Court of Ponce on the 22d of July, 1904, is proof of the existence of this order, for it expressly recites its rendition.

5 (*a*).

## THE DELAY IN BRINGING THIS SUIT CONSTITUTES SUCH LACHES AS TO JUSTIFY ITS DISMISSAL.

It is submitted that the delay of Torres Zayas in bringing this suit is in itself a sufficient ground to justify the refusal of the relief sought and the dismissal of this appeal.

The proceedings by which the mortgage was foreclosed took place in the year 1904. This suit was not instituted until the year 1908.

Applications to set aside judgments, where made after such unreasonable delay on defendant's part as to make him chargeable with laches, are viewed with great disfavor, and will not be granted except upon very strong grounds.

*Parish* v. *McLeod*, 73 Ga. 123.

In *Harwood* v. *Railroad Co.*, 17 Wall. 78, it was held that five years' delay in filing a bill to set aside a decree of foreclosure and sale of a railroad on the ground of fraud is too much when the plaintiffs were aware of the proceedings as they progressed, and do not allege when they acquired knowledge of the fraud nor satisfactorily explain why it was not sooner obtained. The court said (p. 81):—

> "Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case

> does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen."

In *Hall* v. *Jones*, 32 Ill. 38, a suit was brought after a lapse of three years to declare null and void a judgment which had been obtained upon a promissory note. The court, having pointed out that applications to open a judgment, especially where the judgment is one rendered by consent, should be made at the earliest opportunity, and that such applications have but slight claims to favorable consideration after a lapse of three years, went on to say (p. 44):—

> "The confession was in open court, and the judgment was a judicial act done in open court, and it must be presumed the court had sufficient evidence before it to justify the rendition of the judgment. At this late day, after the inexcusable *laches* of the defendant, and the delay unaccounted for, much will be presumed to sustain the judgment of the court."

*Applebee's Appeal*, 126 Pennsylvania State, 385, is a similar decision. There an attempt was made to open a judgment after a lapse of seven years. It was pointed out that such suits are addressed to the discretion of the court, that the judge to whom such application is made acts as chancellor, and that the appellate court will only look to see if his discretion has been abused.

5 (*b*).

## APPELLANT HAS NOT PAID OR OFFERED TO PAY THE MORTGAGE DEBT, AND FOR THIS FURTHER REASON HIS SUIT WAS PROPERLY DISMISSED.

It is a condition precedent to the obtaining of any relief from a court of equity that complainant must have done or offered to do everything that justice and fair dealing demands from him on behalf of the defendant. This principle usually finds expression in the maxim:—

"He who seeks equity must do equity."

*People's National Bank* v. *Marye*, 191 U. S. 272.
*Neblett* v. *McFarland*, 92 U. S. 101.
*Clarke* v. *White*, 12 Pet. 178.

Payments of interest upon the mortgage debt became due in 1904 and 1905; the principal of the mortgage debt became due in 1905. Appellant has not paid or offered to pay either interest or principal. The mortgage has been paid by the appellees and discharged of record, and, if the appellant should recover his land as he requests, he would obtain it without ever paying the mortgage indebtedness.

In *Davis* v. *Gaines*, 104 U. S. 386, an attempt was made to set aside a sale effected under order of court by one purporting to act as executor of the estate. The money obtained from the sale was applied to the extin-

guishment of a mortgage executed by the deceased. It was held that the purchaser, although the sale was irregular or void, could not be ousted of his possession upon a bill in equity filed by the heirs or the devisees unless they repaid or tendered him the purchase money. The court said (p. 403):—

> "Every cent of the purchase money was applied to the extinguishment of the mortgage executed by Clark, and for which his estate was liable. No repayment or tender of this sum or any part of it is averred in the bill. Upon this state of facts, we do not think the complainant is entitled to a decree."

In *McQuiddy* v. *Ware*, 20 Wall. 14, it was held that proceedings for collection of a debt cannot be set aside unless the debtor tenders the amount due before instituting his action.

## IV.

## ADDENDA.

This brief is filed on behalf of Lothrop, Luce & Co. and the heirs of Pedro Juan Rosaly y Capo. The matters briefly mentioned below have no bearing upon the interests of any of these parties. Counsel deem it their duty, however, as officers of the court, to submit the following considerations for the court's attention.

1.

## THE DISTRICT COURT DID NOT ERR IN REFUSING TO ENTER JUDGMENT AGAINST THE DEFENDANT ALICE LOTHROP.

The only service upon the defendant Alice Lothrop was by publication (Record, p. 37), so it is apparent that no personal judgment could be rendered against her. There has never been any attachment of any property of Mrs. Lothrop, in Porto Rico or elsewhere, and so there was no possibility of a judgment *in rem or quasi in rem.* Furthermore, a default in a case of this kind, where service has been only by publication, does not carry with it an adverse judgment. Proof of his right is required on the part of the plaintiff. The mere statement of the provisions of the code of Civil Procedure bearing upon this point is conclusive:—

"CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

SECTION 194—Judgment may be had, if the defendant fail to answer the complainant, as follows:—

. . . . . .

3. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; *and the court must thereupon require proof to be made of the demand mentioned in the complaint;* and if the defendant be not a resident of the Island, must require the plaintiff, or his agent, to be examined on oath, respecting any payments

that have been made to the plaintiff or to any on for his use on account of such demand, and ma render judgment for the amount which he is entitle to recover." (Italics ours.)

2.

## NO SUPERSEDEAS HAS ISSUED ON THIS APPEAL.

No supersedeas bond has been filed in this case (Rec p. 59; U. S. Revised Statutes, Sec. 1000; Rules of th Supreme Court of the United States, No. 29). Becaus of the failure to file such bond, appellees were at liberty to sell the Semil plantation at any time subsequent t the decision of the Supreme Court of Porto Rico. Such a sale by appellees would confer a title upon their grantee which could never be assailed by appellant upon any ground involved in this litigation, for the final judgment of the Supreme Court of Porto Rico was not superseded and as a consequence all the matters decided therein were *res adjudicatae* so long as that judgment stood unreversed. If, by any chance, the judgment of the Supreme Court of Porto Rico should be reversed, rights vested in third parties in reliance on that decision and prior to its reversal are entitled to full protection.

Respectfully submitted,

MALCOLM DONALD,

*Of Counsel for Lothrop, Luce & Co., and the Heirs of Pedro Juan Rosaly Capo, Appellees and Defendants in Error.*

Office Supreme Court U. S.
FILED
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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

## No. 17.

TORRES ZAYAS, APPELLANT,

*vs.*

LOTHROP LUCE & CO ET AL., APPELLEES.

**ADDITIONAL AUTHORITIES REQUESTED BY THE COURT FROM COUNSEL FOR APPELLEES.**

The question of the exact nature of foreclosure proceedings, under the mortgage law of Porto Rico, has not been decided directly by the Supreme Court of Porto Rico. From the remarks of the court, however, with reference to the mortgage law, it is very evident that the court regards a foreclosure sale as a judicial sale and that such a sale is binding on the owner of the land, even though he does not appear in such proceedings.

Martinez *vs.* Rivera, 6 P. R., 175.

Giminez *vs.* Brenes, 10 P. R., 124.

P. R. Leaf Tobacco Co. *vs.* Aldrey, 14 P. R., p. 228 (see p. 233).

See especially remarks of Judge McLeary (dissenting) in Giminez *vs.* Brenes, *supra,* at page 141.

The sale of the land is a proceeding *in rem.* No personal judgment can be entered unless the debtor appears in the proceedings.

The possessory proceeding to have titles to land recorded in the registry of deeds is quite different in its nature. It is merely designed to enable claimants of land to have their *prima facie* claims recorded in the registry. In article 329, of the Mortgage Law, it is expressly provided that claims so recorded shall be without prejudice to a third person having a better claim.

Respectfully submitted,

MALCOLM DONALD,
*Counsel for Appellees.*

that the court excluded testimony offered to show that the transfer was fictitious and that he was still the owner and entitled to notice. 16 Porto Rico 172, affirmed.

THE facts, which involve the validity of a sale of real estate in Porto Rico made in judicial proceedings for the foreclosure of a mortgage, are stated in the opinion.

*Mr. C. M. Boerman* for appellant and plaintiff in error:

This court has jurisdiction on this appeal, as the property claimed and involved is far exceeding the value of $5,000. *Royal Ins. Co.* v. *Martin*, 192 U. S. 149.

The summary proceedings under the mortgage law of Porto Rico are contrary to the provisions of the Constitution of the United States.

There is really no defense to the proceedings on a mortgage under this law. The mortgagor cannot have his day in court. The court virtually does not act as a court, but simply as an executive officer would act. It deprives a man of his property without due process of law.

The general guarantees of life, liberty and property contained in the Constitution of the United States apply to Porto Rico. *Downes* v. *Bidwell*, 182 U. S. 277.

All the laws in force in Porto Rico are so only through the act of Congress which declared them so to be after the change of sovereignty. Article 8, Organic Act of April 12, 1900.

For definitions given by this court to the words "due process of law" see *Hovey* v. *Elliot*, 167 U. S. 409; *Simon* v. *Craft*, 182 U. S. 427. See also *Health Department* v. *Trinity Church*, 17 N. Y. 510, 512; *Stuart* v. *Palmer*, 74 N. Y. 183, 189; *Ieck* v. *Anderson*, 57 California, 251, 253.

The rule of justice which forbids the taking of property except according to the law of the land, means that there shall be no taking, no condemnation, before hearing. *First Nat. Bank* v. *Swan*, 3 Wyoming, 356. See also

*People* v. *Essex County Supr's*, 70 N. Y. 228, 234; *Wright* v. *Cradlebaught*, 3 Nevada, 341, 349; *State* v. *Cutshall*, 110 N. Car. 538; *Lumbering Co.* v. *Wasco County*, 35 Oregon, 498; *Simmons* v. *West. Un. Tel. Co.*, 63 S. Car. 525; *Bennet* v. *Davis*, 90 Maine, 102; *Babcock* v. *City of Buffalo*, Sheld. 317, 340.

Judicial orders or judgments affecting the life or property of citizens in the absence of notice and opportunity to be heard to the party affected, are violative of the fundamental principles of our laws, and cannot be sustained. *In re Rosser*, 101 Fed. Rep. 562, 567; *Holden* v. *Harvey*, 167 U. S. 366; *Jensen* v. *Union Pac. Ry. Co.*, 6 Utah, 253; *In re Jensen*, 59 N. Y. 653, 655; *San Mateo* v. *So. Pac. Ry. Co.*, 13 Fed. Rep. 722, 752.

The provisions of the mortgage law itself were not complied with in the proceedings to foreclose the mortgage and therefore those proceedings are null and void.

*Mr. Malcolm Donald* for appellees and defendants in error.

Mr. Chief Justice White delivered the opinion of the court.

The plaintiff in error, Marcelino Torres Zayas, in January, 1908, brought this suit to set aside a sale of real estate, made in judicial proceedings, of a summary or executory character, for the foreclosure of a mortgage and to recover the property with fruits, revenues and damages. The right to the relief sought was based, broadly speaking, upon the following grounds: *a*, the prematurity of the suit to foreclose because there was nothing due when the proceedings were commenced; *b*, the absence of a necessary party; *c*, vices in the proceedings, of such a character as to cause them to be absolutely void. The trial court dismissed the suit. On appeal, the Supreme Court of Porto Rico

affirmed and it is to reverse such judgment that the writ of error and the appeal in this record were prosecuted. Having the power to review only by appeal, (*Garzot* v. *de Rubio*, 209 U. S. 283) the writ of error is dismissed and we consider the case on the appeal.

The court below directed attention to the slovenly and ill arranged record, but despite its admonition nothing seems to have been done to re-arrange the record for the purposes of review by this court. We are not authorized to reëxamine the evidence, but a statement of facts made by the court below, and in a case where there was no such statement our duty would be to affirm because it would be impossible to decide that error had been committed. There is a statement of facts in the record, but it is unsatisfactory in many respects since in matters which are important it is silent where it should speak and in negligible matters speaks with unnecessary prolixity, being confusedly arranged and in important particulars but states evidentiary facts without any attempt to find the ultimate fact properly to be deduced from the stated evidence. We mention these subjects in order to direct the attention of the court below to them and to avoid the making of like statements of fact in the future. As the court delivered a full opinion which throws light on the statement and as in substance our conclusion will be rested upon documents which are uncontroverted and facts which are clearly found by the court below and are undisputed, we come to dispose of the case, giving, as a prelude, a statement which we deem necessary to an understanding of the matters for decision.

Torres owed a debt of $47,000 to W. S. H. Lothrop which Torres had assumed in 1898 on the purchase of certain real estate upon which the debt was secured by a conventional mortgage. The firm of De Ford & Company had acquired this debt from Lothrop, and in February, 1901, gave Torres an extension of four years to

February, 1905, new notes being furnished as evidence of the debt bearing ten per cent. interest payable annually and the notes being secured by a conventional mortgage on two pieces of property belonging to Torres and upon a third piece belonging to a commercial firm who intervened in the act and mortgaged its property to secure the debt of Torres. By the ninth clause of the act of mortgage it was agreed that the crops made by Torres on the property mortgaged by him, should be shipped to De Ford & Company who should sell them, applying the proceeds first to the interest and then to the principal of the debt. The mortgage, while indivisible as between the parties, was as to third persons made divisible, a specific portion of the debt being assigned to each of the three properties. The original mortgage due by Torres was cancelled and erased on the execution of the new one. The crops were shipped to De Ford & Company in 1902 and 1903, and were sufficient to pay the interest. In the crop year 1904, Torres solicited advances from De Ford and Company to enable him to make his crop, and acceding to his request the firm either directly advanced or paid off advances made by others, charging the same to Torres. When the crops came in and were sold, their proceeds were inadequate to pay these advances and the interest. They were imputed primarily to the advances leaving the interest unpaid, this being done with the assent of Torres, who had monthly accounts rendered him and made no objection whatever to the debiting of advances or the imputation of payment. The interest for 1904 remained unpaid and a suit to foreclose the mortgage was commenced by a summary, or executory process in accordance with the local mortgage law. There was filed with this suit a certificate reciting that the mortgaged property stood upon the public records in the name of Torres, this certificate having been issued by the registering office a day or two before the commencement of the suit. On the day the foreclosure suit was filed,